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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

COMPLETED BY OLIVER MILLER, Esq.,

OF THE ANNAPOLIS BAR

VOL. VIII.

CONTAINING CASES IN 1849.

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NAMES OF THE JUDGES, &c.,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.
Hon. ALEXANDER C. MAGRUDER, Judge.
Hon. ROBERT N. MARTIN, Judge.
Hon. WILLIAM FRICK, Judge.

OF THE COURT OF CHANCERY.

Hon. JOHN JOHNSON, Chancellor.

OF THE COUNTY COURTS.

First Judicial District—*St. Marys*, *Charles* and *Prince Georges* Counties.

Hon. ALEXANDER C. MAGRUDER, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. P. W. CRAIN, Do.

Second Judicial District—*Cecil*, *Kent*, *Queen Anne* and *Talbot* Counties.

Hon. E. F. CHAMBERS, Chief Judge.
Hon. PHILEMON B. HOPPER, Associate Judge.
Hon. JOHN B. ECCLESTON, Do.

Third Judicial District—*Calvert*, *Anne Arundel*, *Montgomery* and *Carroll* Counties, and *Howard* District.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. THOMAS H. WILKINSON, Associate Judge.
Hon. NICHOLAS BREWER, Do.

FOURTH JUDICIAL DISTRICT—*Caroline*, *Dorchester*, *Somerset* and *Worcester* Counties.

Hon. ARA SPENCE, Chief Judge.
Hon. WILLIAM TINGLE, Associate Judge.
Hon. BRICE J. GOLDSBOROUGH, Do.

FIFTH JUDICIAL DISTRICT—*Frederick*, *Washington* and *Allegany* Counties.

Hon. ROBERT N. MARTIN, Chief Judge.
Hon. RICHARD H. MARSHALL, Associate Judge.
Hon. DANIEL WEISEL, Do., (appointed October 18th, 1847.)

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* Counties.

Hon. WILLIAM FRICK, Chief Judge.
Hon. JOHN PURVIANCE, Associate Judge.
Hon. JOHN C. LE GRAND, Do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. ALEXANDER NISBET, Associate Judge.
Hon. W. G. D. WORTHINGTON, Do.

ATTORNEY GENERAL.

GEORGE R. RICHARDSON, ESQUIRE.

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REPORTS OF CASES

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IN THE

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OF

MARYLAND.

DECEMBER TERM, 1849.

JOHN HANSON THOMAS, *vs.* JOHN T. MASON, AND MARGARET A., HIS WIFE, AND JOHN DOUB.

Lands were conveyed to trustees, in trust, to sell and pay the debts of the grantors, according to legal priority. The proceeds were misapplied by the trustees, and *D.*, a purchaser, whose land (for which he had paid the trustees its full value,) was levied upon by judgment creditors having liens prior in date to a judgment of *T.*, who had also purchased lands under the same trust, but had retained the purchase money, and applied it, under an agreement with the trustees, to his own junior judgment, filed a bill against said *T.*, and other co-purchasers, praying for an account and contribution, and that *T.* might be required to pay in his purchase money, to be applied to the elder judgments, with a view to exonerate the land of complainant. After the answer of *T.*, the complainant filed an amended bill, charging that *T's* judgment, to which he had so applied his purchase money, was founded in usury, and, therefore, void. Upon demurrer, on the ground, among others, of multifariousness, it was HELD:

That the relief prayed in the original bill, being essentially and virtually against the operation given to *T's* judgment, there is no inconsistency in the amended bill, which questions the amount of that judgment—the whole transaction being predicated upon one and the same judgment.

Multifariousness is the blending in one bill matters, in their nature, separate and distinct. But not so, if there be two good causes of complaint growing out of the same transaction, where all the defendants are interested in

the same rights, and where the relief against each is of the same general character.

In this case, the different causes of complaint are not inconsistent or different in their nature and character. They all grow out of the same transaction, in which, in substance, but one question of right is involved, viz: the right of the complainant to be relieved from the preference and effect given to this alleged usurious judgment, by the agreement and acts of *T.* and the trustees.

The payment of trust money to *T.*, who, under the circumstances, was not entitled to it, whether the money of the complainant, or other purchasers, established such a relation between all of them, that if any one is called upon to pay again, there is such privity between him, and all the others, that he can seek in equity to have the money restored, and properly applied.

In equity, the money paid to *T.*, or the price of the land sold to him, becomes the fund of the party who is prejudiced by the misapplication, and his resort is not alone against the trustees, but he may follow the fund.

T. must be considered as a purchaser, independent of his judgment and agreement, and his purchase money ought to be paid to the trustees, and cannot be retained by him in satisfaction of his own judgments, unless the prior judgments against the grantors are satisfied.

No arrangement with the trustees could let in his judgments before their proper order.

In adjusting his claim, these judgments of *T.* are not conclusive, but open to inquiry. They could be impeached by subsequent judgment creditors, for fraud, collusion, payment, or usury, with a view to defeat them, and let in subsequent liens.

It is the right of every party, in equity, to question the title, or the legality of a claim that precedes his own, and, by a successful impeachment, to render it void, and defeat it.

If subsequent judgments have been paid with the complainant's money, he stands subrogated in the place of these subsequent creditors, is interested in knowing the extent and legality of all the preceding judgments, and, therefore, has such privity and interest as will entitle him to implead *T.* in respect of his judgment, and call on him for a discovery in relation thereto.

Where a party seeks to relieve himself, on the ground of usury, from the payment of the sum claimed on a contract, he must tender the amount actually due; but where the contract or judgment is already satisfied, and the party seeks to have the excess accounted for, and restored, the reason of the rule ceases.

A willingness to allow all that is actually and fairly due, is the equitable requirement, and as the complainant, in his bill, insists that *T's* judgment "ought to stand only as a security for the sum actually due from the defendant in it," this, under the circumstances of this case, if not an actual tender, is fully equivalent to what the rule requires; it is an offer to do equity before he asks relief.

The case of *Jordan vs. Trumbo*, 6 *G. & J.*, 103. asserts the rule in all its breadth, but evidently applicable only where relief is sought against payment and compliance with an usurious contract.

T. has no claim to profit by the complainant's neglect. But for the agreement between him and the trustees, the lands and funds applied to his judgment would still be at the disposal of the trustees, for the relief of the complainant. That agreement cannot over-reach the trust, or the prior creditors to the prejudice of their judgments, and the complainant being, in every equitable point of view, (his lands being held liable for those judgments,) one of those creditors, has a just claim, in a court of equity, to the relief prayed.

Appeal from the *Court of Chancery*.

The original bill in this case will be found set out in full in the case of *Doub vs. Barnes, et. al.*, 4 *Gill*, 1, as well as the answers of other defendants. The answer of *Thomas*, the present appellant, is sufficiently stated in the opinion of this court on the present appeal, delivered by his honor, *Judge Frick*. The character of this answer, or other circumstances, induced the complainant to file an amended bill, the averments of which are, also, fully stated in said opinion. To this amended bill the appellant demurred, but the chancellor, (Johnson,) on the 9th of December, 1847, overruled the demurrer, and ordered the defendant to answer, and, at the same time, dissolved the injunction before granted, restraining execution of the judgments assigned to *Mrs. Mason*, directed an account to be taken for the purpose of ascertaining the sums to be contributed by the several purchasers from the trustees, towards payment of the judgments mentioned, and also an account against *Price*, the surviving trustee, and reserved the equities between the complainant and the defendant, *J. H. Thomas*, growing out of either the original or amended bill.

From this decree the defendant, *Thomas*, appealed.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By William Schley, for the appellant, and
By Thos. S. Alexander, for the appellee.

FRICK, J., delivered the opinion of this court.

John Hanson Thomas was made a defendant to the complainant's original bill in this cause, as a purchaser of parcel of the lands from the trustees, long after the complainant had purchased. It is alleged that no part of the purchase money, agreed to be paid by him, has been paid to the trustees, but was reserved in his hands, under an impression entertained both by the trustees and himself, that the trust fund, exclusive of these purchases made by him, would be adequate to the discharge of all the judgments of older date and lien than the judgment recovered by *Thomas* against the grantors, in 1839; and, consequently, that the money in the hands of *Thomas* would be properly applicable to the payment of the incumbrance held by him.

The bill, however, affirms that this impression is not sustained by the result, but that the judgments of *Mrs. Mason*, on which the executions have been issued, are prior in date and lien to the judgment recovered by *Thomas;* and that, therefore, *Thomas* should be required to pay in the purchase money due from him for the benefit of these prior judgments, before the complainant is called upon, a second time, to pay for the land which he had purchased, and already paid for.

The answer of *Thomas* admits, that at the date of the deed of trust, he held three judgments against the grantors, on the first of which he received a payment, and then assigned it to *Dodge* On the second, he received part in money, and purchased from the trustees a part of the trust estate originally belonging to *Barnes*, on the express condition that the purchase money was to be credited on said judgment. On the third judgment he received payments in money, $2,800 on the 9th of January, 1840, and $5,000 on the 17th of April, 1840; and, under a written agreement between him and the trustees, on the 23rd of February, 1844, he received from them, by conveyance, parcels of the trust estate valued at $2,312.50, the note or obligation of *Doub*, the complainant, to the trustees, for the further sum of $967.50, given to secure the payment

of the purchase of part of the trust estate sold to *Doub*, and the individual notes of the trustees, for the sum of $2,136.42.

This agreement further stipulates, "that *Thomas* is not to pay for said land, otherwise than by crediting its value on said judgment, and that such credit is not to be absolute, unless the title which the said *Thomas* shall acquire, under the conveyance from the trustees, shall be good, and unincumbered, and indefeasible; that the trustees are to extinguish all prior liens on the lands to be conveyed as aforesaid, and that *Thomas* is to hold said lands, the note or obligation of *Doub*, and to be entitled to require payment of the notes to be given him by the trustees, even if it should thereafter appear, that the assets in the hands of the trustees, would not avail to pay so much on the said judgment."

After this answer of *Thomas*, the complainant filed his amended bill, in which he charges that the judgment of the 9th of January, 1839, was founded upon a corrupt and usurious agreement between said *Thomas* and *Barnes*, the particulars of which are set forth and charged in the said amended bill; claiming that, by reason of said usury, the judgment was absolutely void, or, at least, ought to stand only as a security for payment of the sum actually received by *Barnes*, upon the transaction between them, and then prays a discovery as to the agreement, and such relief as his case may require.

To this amended bill, *Thomas* has demurred, and the demurrer being, by the chancellor, overruled, that decision is now before us for review. The grounds insisted upon in support of the demurrer are:

1st. That by the amendment, the bill, as amended, has been rendered multifarious.

2nd. That complainant has no interest, right or title to implead this appellant, touching the matter of said amended bill.

3rd. That the complainant (conceding that he has any interest or right to implead this defendant, touching the consideration of said judgment,) ought to have tendered his willingness to pay the amount actually due.

4th. That in the averments, scope and object of his bill as

amended, there is no equity shewn, entitling the complainant to the discovery or the relief prayed, or to any discovery or relief touching the matter of said amendment.

The first objection is, that *Doub*, by his amended bill, has departed from the design of his original complaint, and blended with it other matters out of the scope of, and inconsistent with it; and it is thus charged to be multifarious, because, in the original, he is charged as a *purchaser* of the lands, and called upon to pay in the purchase money, to be applied to elder judgments, when, by the amended bill, the complainant arraigns him as a *creditor*, and seeks to be relieved against the judgment as obtained in execution of an usurious agreement. It will be remembered, that the bill seeks for an account, and the proper application of the funds of the trust, to the discharge of the judgments, according to their just priorities, alleging that *Thomas* is both a judgment creditor of the grantors, and a purchaser of land from the trustees, the purchase money for which, still remains in his hands, under the assertion that (by the agreement with the trustees,) it is properly applicable to the payment of his judgment. The complainant, on the part of judgment creditors, prior in date to the judgment of *Thomas*, is called upon to pay, a second time, for the lands purchased by him, and insists upon his equity in requiring *Thomas* to pay in the amount of his purchase money, in the first instance, for the benefit of these prior creditors. And further, in his amended bill, he impeaches the validity of this judgment of *Thomas*, on the ground of usury, and claims that, if not void, it should stand only as a security for the sum actually advanced by *Thomas* to *Barnes*. That is to say: that in the account with *Thomas* and the trustees, in the credits to be allowed upon his judgment, in the proper administration of this trust, he is first to be postponed to the elder judgments, and then is not to be let in upon a basis more comprehensive than the amount actually paid by him. There is, then, no inconsistency here, the whole transaction being predicated upon one and the same judgment: and when the purchase money is claimed to be set off by *Thomas*, as a credit against this judg-

ment, it is the right of *Doub*, who is exclusively affected by it, to enquire into the validity and consideration of the judgment, and the relation in which it stands to the other judgments sought to be enforced against him. If, as claimed in the original bill, *Thomas* was required to pay in his purchase money, *Doub* would be relieved to that extent, from the judgment of *Thomas* operating upon the fund, unless, in its order, postponed to *Mrs. Mason's*; and there the scope and object of the bill against *Thomas*, is to obtain relief against the effect which the trustees and *Thomas* have agreed to give to his judgment, by a compromise, which makes it available in advance of the others, and upon a condition that violates the trust deed, unless the prior judgments can be first liquidated from the trust funds. But, for this judgment, *Thomas*, as the agreement shows, would not have purchased land; or, if an unconditional purchaser, must have paid the purchase money, against which he now sets off his judgment. The relief, then, prayed in the bill, is essentially and virtually against the operation given to this judgment; and there is, therefore, no inconsistency in the amended bill, which questions the amount of the judgment, and seeks to reduce it to its proper standard and value in a court of equity, for, besides the value of the land which he purchased, and for which he credits the trust fund upon his judgment, (and which it is the object of the bill to bring in money into the hands of the trustees,) it is alleged, that if the *actual* debt due to him be discovered, it will result that he has received more than his actual principal and interest, even without regard to the other question, upon the priority of liens.

Multifariousness is said to be "the blending in one bill matters which are, in their nature, separate and distinct." *Story's Eq. Pl.*, 224. "Different subjects, which may embarrass the defendant in his proper defence against each, and may require different proceedings or decrees on the part of the court." *Same*, 231. "But not so, if there are two good causes of complaint growing out of the same transaction, when all the defendants are interested in the same rights, and where the relief

against each is of the same general character." *Same*, 233, –'34, *(note* 1,*)* and 5 *Paige R.*, 160.

The complainant's bill is precisely of this character. He, with defendants, was a co-purchaser of lands under this deed of trust. By reason of the alleged misapplication of his purchase money, the judgments against his lands, so purchased, remain open. To relieve himself, he avers the consent of the judgment creditors to the deed, and the proceedings of the trustees under it, and (failing in this,) he questions the amount and validity of these judgments, calls upon the purchasers to pay in their purchase money, before he is called upon to pay again, and claims from the other purchasers under the trust, contribution in aid and relief of those judgments still binding on his purchase. "The inquiry is not, whether each defendant is connected with every branch of the cause, but, whether the plaintiff seeks relief in respect of matters which are, in their nature, separate and distinct." *Daniel's Ch. Pr.*, 439, 449, and *Attorney General vs. Goldsmith & Co.*, 5 *Sim.*, 670–'75.

But, it is said that there is an obvious distinction here, where the party seeks not only to be relieved from the excess of usury, but the just debt; the principal and interest received by *Thomas* is invoked (by contribution,) in aid and relief of the complainant, thus cutting off the excess of his judgment, and claiming, besides, an abatement from the true amount which the rule of equity awards him. Conceding that *Doub* may properly implead the defendant, in relation to the objects of his bill, it is not perceived that any violence is here done to the rule, and to the just principles which must always control a court of equity.

If it is first established, that the judgment cannot avail *Thomas* for more than the amount actually due to him over the usurious excess; why should that judgment, thus adjusted, stand afterwards in relation to the liens in a better and preferred condition to elder judgments? Not because it has been paid by the trustees, for the payment was improperly made. It is the very ground upon which it is impeached, and the burden of complainant's bill is, that nothing should have been paid; neither the usurious interest, nor the actual amount advanced, in

preference to the elder judgments which he is now called upon to satisfy. And thus two distinct equities are raised: 1st, that the excess of usury, to which defendant has no right, shall go to reduce these elder judgments, and 2nd, that the amount which he received from the trustees, over and above what his judgments would be entitled to, in their order of priority, should be brought in to lessen *Doub's* contribution. This is the relief asked by the complainant, and presents to the consideration of the court the two subjects in a view entirely compatible with each other.

The whole matter of complainant's bill is, therefore, entirely homogeneous. The different causes of complaint are not inconsistent or different in their nature and character. They all grow out of the same transaction, in which, in substance, but one question of right is involved, as regards the defendant, *Thomas;* the right of the complainant to be relieved from the preference and effect given to this alleged usurious judgment by the agreement and the acts of *Thomas* and the trustees. In this view, the objection of multifariousness is not sustained.

2. And is there no right here, on the part of complainant, to implead this defendant? no privity of right and obligation between them? As the purchaser of *J. T. Mason's* land, *Doub's* purchase money ought to have been applied to the judgments against *Mason*. It was the duty of the trustees so to apply it. Such application would have relieved the land from the judgments which *Mrs. Mason* (as assignee of them,) now seeks to enforce; and, in any event, would have left *Thomas'* judgment unsatisfied. The payment of the trust money to *Thomas*, who was, under the circumstances, not entitled to it, whether the money of *Doub*, or of other purchasers, established such a relation between all of them, that if any one of them is called upon to pay again, there is such privity between him and all the others, that he can seek in a court of chancery to have the money restored, and properly applied. In equity, the money paid to *Thomas*, or the price of the land sold to him, becomes the fund of the party who is prejudiced by the mi-

application, and his resort is not alone against the trustees in this case, but he may follow the fund.

Thomas, as a purchaser of the lands, must be considered as such, independant of his judgment and agreement. The purchase money ought to be paid to the trustees, as part of the general fund, for the purposes of the trust, and cannot be retained by him in satisfaction of his judgment, unless the prior judgments against the grantors are satisfied. For the elder judgments, unsatisfied, may be levied upon this land, even if paid for by *Thomas* to the trustees, and he would lose the money paid.

If, on the contrary, the elder judgments are satisfied, there would be just pretext for withholding the purchase money, as the trustees would only pay it back to him, in discharge of his judgment under the terms of the deed, or in his order of priority in law, which the terms of the deed could not affect. Lest the elder judgments might remain a charge upon the land bought by him, the purchase money has been withheld; and if the proceeds of the sale of all the lands, left nothing to be applied to his judgment, but, on the contrary, showed a *deficit*, he must be called upon to pay, or the lands bought by him are liable to be sold for the deficiency. No arrangement with the trustees could let him in before his judgments attached in their proper order. He is, therefore, a naked, unconditional purchaser, without the shadow of right or pretext to set off his judgment of 1839, against the claim of the trust to the purchase money, and is to be treated as such in the further administration of the trust.

Assuming that the prior incumbrances had all been satisfied, the proper period would then arrive for the liquidation of his judgment, out of the amount of his purchase money. In adjusting his claim, are these judgments conclusive or open to inquiry? Suppose there be subsequent judgment creditors likely to be excluded from the fund, may they not challenge the legality of these judgments, or the amount claimed under them? may they not be impeached on the ground of fraud, collusion, payment, or usury, with a view to defeat them, and let

in the subsequent liens? And is there no such privity between the several parties to these judgments, as to warrant such inquiry? It is the constant practice to permit a subsequent mortgagee to question the title and claim of a prior incumbrancer, and to take advantage of the legal defect or taint of the elder incumbrance. It is the right of every party in equity to question the title or the legality of a claim that precedes his own, and, by a successful impeachment, to render it void, and defeat it.

And what is *Doub's* position here? Is he less a privy here, than if he were a judgment creditor postponed to *Thomas*? He is called upon to to pay the judgments of *Mrs. Mason*, which are prior in lien to the judgment of *Thomas*, here in question. He has already paid the full value of his lands, but by the former decision of this court, he cannot extricate them from the grasp of these liens. The land purchased by *Thomas*, and not paid for, is equally liable in equity to the payment of these judgments; and *Doub's* purchase may be further liable to contribute to the liquidation of succeeding judgments, in their order, until he has paid for his purchase over again. If, then, subsequent judgments have already been paid, and with *Doub's* money, (as necessarily they must be,) does he not stand subrogated in the place of these subsequent creditors, (as if they were parties called to refund,) and is he not interested in knowing the character, the extent and legality of all the preceding judgments? That of *Thomas* is alleged to be tainted with usury; and if it can be successfully impeached, who is more concerned than *Doub* in defeating it, that he may, thereby, lessen the amount of his contribution? Has he not, then, such privity and interest here, as to entitle him to call on *Thomas* for a discovery, and is not the discovery material to the relief sought by the bill? We are of opinion that, on these grounds, he is properly in court.

3. Still it is argued that, conceding this right, *Doub* is yet bound, by the rules of equity, to pay or tender the amount admitted to have actually passed in the transaction between *Barnes* and *Thomas*, before he can maintain his bill. The

rule is undeniably so, where the party seeks to relieve himself from the payment of the sum claimed upon the contract. But, when the contract or the judgment is already satisfied, and the party seeks to have the excess accounted for, and restored, the reason of the rule ceases. The defendant, here, has already received all and more than he is entitled to, as the complainant alleges. The tender contemplated under the rule, is not mere form, and to suppose it necessary to pay, or at least to tender payment of an amount over again, where the allegation is, that the defendant received more than his due, would be a wide departure from the paths of equity. A willingness to allow all that is actually and fairly due, is the equitable requirement, and this the complainant has expressly reserved to the defendant in his bill. He asks for a discovery of what was actually paid by *Thomas* to *Barnes*, and insists that the judgment is void, by reason of the usury, and that, "at least, it ought to stand only as a security for the sum actually realised by *Barnes*" from the transactions between them. And is not this, under the circumstances of this case, if not an actual tender, equivalent fully to what the rule requires, an offer do do equity before he asks relief? If he is to pay down the actual principal and interest of this debt; that is, in fact, to pay the debt over again, before he can even ask relief, the doors of chancery are closed upon him. It is a denial of all relief. The case of *Jordan* and *Trumbo*, 6 *G. & J.*, 103, it is true, asserts the rule in all its breadth, but evidently applicable only where relief is sought against payment and compliance with an usurious contract. For it is said, "after payment of the claim, he may pray to be relieved as to the amount paid beyond what was legally due and recoverable;" of course not assuming that he shall tender to pay again what he has already paid, and seeks to recover back again, by his bill. The cases cited from *Paige*, do not contravene this position. In *Judd vs. Seaver*, 8 *Paige*, 548, the bill was for relief against an usurious contract. There was no offer to pay anything. By the court, "there are cases that decree, sometimes, payment of this amount equitably due; but it is where the offer is to pay whatever should be found to be

due, and *waiving a forfeiture* as to everything except the usurious premium." And in 3 *Paige*, 531, it is said, complainant cannot call on defendant for discovery of the usury charged, unless he pays, or offers to pay the amount equitably due, for the *reason*, "that he is not bound to make a disclosure that might subject him to forfeiture, or loss of the whole, or any part of the money actually lent." Therefore, where the complainant submits *to allow* what was actually due, the reason for the rule is gratified. It is no more than the standing maxim exemplified, that he that will have equity, must do equity.

4. Upon the last point of objection here taken, we have before intimated that complainant, in his bill as amended, has shewn himself entitled to the discovery and the relief prayed. The bill charges him as the purchaser of lands, under the same trust under which the complainant purchased, and that he has paid no part of his purchase money. His answers sets up the agreement with the trustees, by which the amount of his purchase was to be credited upon the judgment in question. The amended bill charges that this judgment was obtained upon an usurious agreement, and prays for discovery. When *Thomas* purchased of the trustees, he knew of the existence of this deed of trust, and the agreement shows that he treated with *Price* and *Yost* as trustees, and has thus assented to the terms of the deed. He stipulated with them to make the sale only conditional, unless the title under their conveyance should prove unincumbered. He takes the lands under a judgment, which could not legally be paid until every dollar of *Mrs. Mason's* assigned judgments should be paid. *Doub* is now called upon to pay these judgments from the misapplication by the trustees of his purchase money; and defendant, who has paid nothing, wrests from him the only remnant of property from which he could be secured. He receives from the trustees *Doub's* bond for the lands purchased by him, which ought have been applied to extinguish prior liens, and by the receipt of moneys, countenances a clear perversion of the trust, and prevents the proper application of the fund. His agreement with the trustees, to extinguish prior liens, shews that he knew such existed.

and the only liens then outstanding, were *Mason's*, and *Lynch & Craft's*. When he received from the trustees the sum of $7,800, he must have known, from this stipulation, that he was taking it to the exclusion of elder judgments, and by assenting to the deed, as he did, why should not the parties aggrieved by this misapplication, have redress against him? The trustees could not bargain him into a position more advantageous than his judgment, or the deed gave him; and it is not, as is contended, a question only between the creditors and the trustees, or between the purchasers and the trustees, or between himself, as a purchaser, and the trustees. By the perversion of the trust, complainant has been injured, and his purchase put in jeopardy, by the wrongful act of the defendant and the trustees. His privity with all the parties, is established by his purchase with defendant from the same trustees, and his right and duty to look to the proper application of the trust fund, of which defendant still retains a portion in his hands, as the bill alleges. It is nothing to the purpose to say, that *Doub* has forfeited his standing in a court of equity, by his own negligence; that he had warning of the misapplication of his money, and yet continued to rely upon the trustees. Authorities have been cited to show, that coming into a court of chancery, he must show a case free from any laches on his part, and that such laches existing, must rule him out of court. To the full extent, this principle has been applied to him in the case of *Lynch & Craft*, and the preceding cases. He has paid the full amount of his purchase money, and more, and has received no title yet. He has suffered the penalty of his neglect to look to the application of his moneys, to the judgments by which the lands were bound. But how can this avail the defendant here? If *Doub's* money had been altogether applied to the judgments on *Mason's* lands, other judgments, prior to *Thomas'*, would still bind the land which *Thomas* claims to have purchased, in extinguishment of his judgment. This seems to have been in the view of *Thomas*, by the arrangement he entered into, that the trustees "were to extinguish all prior liens on the lands to be conveyed to him." It was no

sale, unless the purchase money could be credited in value on the judgment. Upon what equity can such an agreement be supported to the prejudice of other creditors, whose rights, under the deed, and in priority of law, are superior to his? The trustees may have assumed that the prospective state of the fund would have justified this arrangement; but the assumption is now asserted to be groundless. The complainant's lands are now under execution, to pay these elder liens, which he has once before paid to these trustees. By a misapplication of the funds, they have anticipated the payment of *Thomas*' junior judgment; whether out of complainant's identical money, or not, is immaterial. It was, at all events, a fund that should have been applied to these elder judgments, and no agreement between *Thomas* and the trustees can be permitted to divert it, particularly when it compels complainant to pay a second time for his purchase, while *Thomas*, (upon the hypothesis that the trust fund is exhausted,) upon the judgments preceding him, pays not one cent for the land conveyed to him by the trustees.

Thomas can, therefore, have no claim to profit by the complainant's neglect. But for the agreement between him and the trustees, the lands and funds applied to his judgment would still be at the disposal of the trustees, for the relief of *Doub*. That agreement cannot, in any form, be permitted to overreach the trust, or the prior creditors, to the prejudice of their judgments. *Doub*, in every equitable point of view, his lands being held liable for those judgments, is one of those creditors, and has a just claim, in a court of equity, to the relief prayed. The chancellor's order overruling the demurrer, is therefore affirmed.

ORDER AFFIRMED

Francis Dodge *vs.* John Doub and J. T. Mason, et. al. *December,* 1849.

Three persons conveyed their lands to trustees, in trust, to sell and pay the debts of the grantors, according to their legal priorities. At the time of this conveyance, there were judgments to a large amount against the grantors, both jointly and severally: Held, that in administering this trust, the proceeds of the lands are not to be regarded as one common fund, to be applied to the judgments against all or any of the grantors, according to priority, without reference to the source whence the fund arose, or whether the judgments were against one, two, or all the grantors, but that the proceeds of the lands of each were to be applied respectively to the judgments against each, according to priority.

A party who purchased the lands conveyed by one of the grantors, and applied his purchase money in discharge of judgments against such grantor, cannot be called upon to contribute, or account with any one, except the purchasers of such grantors' lands, or his unsatisfied judgment creditors, prior, in point of date, to those satisfied by him,

Appeal from the *Court of Chancery.*

The appellant in this case was one of the defendants to the bill of *John Doub,* referred to in the preceding case. He purchased from the trustees a portion of the land conveyed to them by *Abraham Barnes,* and takes this appeal from the order of the chancellor, of the 9th of December, 1849, requiring him to account. The facts of the case sufficiently appear from the opinion of the court, the preceding case, and the case of *Doub vs. Barnes, et. al.,* 4 *Gill,* 1

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Pratt and F. A. Schley, for the appellant, and
By Mason and J. D. Roman, for the appellee.

Dorsey, C. J., delivered the opinion of this court.

It has been conceded, in the argument of this case, that the proceeds of the sales of the lands conveyed to the trustees, *Price* and *Yost,* by *Abraham Barnes, Melchoir B. Mason* and *John Thompson Mason,* were not to be regarded as one com-

mon fund, to be applied to the payment of the judgments rendered against all or any of the grantors, according to their priorities, without reference to the source from which the fund about to be distributed arose, and without regard to the fact, whether such judgments had been obtained against one, two, or all of the grantors; but, that the money arising from the sales of the lands of each were to be appropriated, respectively, in discharge of the judgments against each, according to their priorities. Upon this concession, (of the correctness of which we entertain no doubt,) we are of opinion, that the appeal of *Francis Dodge*, in this case, has been well taken. Before he could be compelled by the appellee to account with him, as decreed by the chancellor, the allegations in the bill, and the proofs in the cause, must have shown, at least, a probable ground for believing, that by such accounting it would appear that something was due, by way of contribution, from the appellant to the appellees. Upon the concession above mentioned, we are enabled to discover no sufficient ground for such a belief. The land purchased by *Dodge* of the trustees, was part of that conveyed to them by *Abraham Barnes*, and not by *Melchoir B. Mason* or *John Thompson Mason*. And, consequently, the purchase money paid by *Dodge* ought to have been, and most probably was, applied in satisfaction of the judgments rendered against *Abraham Barnes*, long anterior to the dates of the judgments against *John Thompson Mason;* the amount of which judgments against *Barnes* was so great, that, consistently with the deed, no part of the purchase money arising from the sales to *Dodge*, could properly be made applicable to the payment of the judgments against *John Thompson Mason*, for the payment of which, his lands were sold by the trustees to *Doub* and others. *Dodge*, soon after his purchases, appears to have paid for the lands he bought, either by discharging senior judgments against *Barnes*, or by paying to the trustees the balance due from him, to be appropriated to such purpose. If *Dodge* can be called upon to contribute or account with any one, it must be with the purchasers of *Abraham*

Barnes' lands, or with his unsatisfied judgment creditors, prior in point of time to those of *John Thompson Mason*.

This court will sign a decree reversing the decree of the Chancery Court, of the 9th December, 1847, so far as it respects *Francis Dodge*, and as to him dismissing the appellees' bill of complaint, but without costs, either in this court or the court below.

DECREE REVERSED.

JOHN MASLIN, ANN MASLIN, AND OTHERS, LESSEE, *vs.* JOHN H. THOMAS.—*June Term*, 1849.

Where an estate tail is docked by a deed of bargain and sale, under the act of 1782, ch. 23, an outstanding, unsatisfied judgment against the tenant in tail, will not be let in as a lien or incumbrance on the estate thereby created or enlarged, as would have been the case, had the estate tail been barred by a common recovery.

It was an incident to a common recovery suffered by a tenant in tail, to let in all preceding incumbrances, but there is no such incident to the deed of bargain and sale. Nor is it incident to an estate tail that every mode of defeating it shall have such effect.

The act of 1782, ch. 23, abolished the ancient mode of docking estates tail by common recovery.

A party who takes a deed from a tenant in tail, which he is authorised, by the act of 1782, to take, is not thereby estopped, as the recoveror in a common recovery would be, from averring that the tenant in tail had only an estate tail.

The concluding words of this act, that all persons shall be debarred who might or could be debarred "by any mode of common recovery," cannot have the effect to introduce a new or more convenient *common recovery*, with all the incidents to the ancient mode, but were used *ex abundanti cautela*, as without them, it might have been contended, that a deed of bargain and sale, or other conveyance of an estate tail, would only perform the office of a fine, or a common recovery with a single voucher.

Where testimony is offered, which has no tendency to prove the issue in the case, it is error to permit it to go to the jury.

The declarations of a tenant in tail, that he "got the land in controversy by

intailment," are admissible for the purpose of proving pedigree, *but not to prove his title to the land as tenant in tail.*

Estates tail are created by deed or will, which must be produced, or a proper foundation must be laid for presuming that they existed. Their existence is not to be proved by oral testimony of this description.

Appeal from *Queen Anne's* county court.

This was an action of ejectment instituted by the lessors of the plaintiff (the appellants,) against the appellee, in *Queen Anne's* county court, at November term, 1847, for the recovery of a tract of land situated in said county, called "*Boothby's Fortune*," containing about 500 acres, more or less. The defendant took defence on warrant.

1st Exception. At the trial, the plaintiffs offered in evidence a patent dated 1st of February, 1695, granting the land in question to one *Thomas Jackson*, and then offered the will of *Samuel Wallis*, executed the 19th of September, 1717, which contains, among others, the following clause: "*Item.*—I give and bequeath unto my son, *William Wallis*, five hundred acres of land, lying in *Queen Anne's* county, called "*Boothby's Fortune*," and also seventy acres of land lying in *Kent* county, being part of "*Partnership*," that runs down to *Chester* river; and it is my will, that if either of my sons, *Samuel* and *Hugh*, should die without issue, that his part go to my son, *William Wallis;* and if my son *William* should die without issue, that then the survivors of my said sons to have the aforesaid land equally divided between them." They then proved by oral testimony, that another *William Wallis*, the great-grandson of the above named devisee, and his only male descendant, was in possession of said land as tenant in tail, until he sold the same to one *Lewis Blackiston*. Much other proof was also offered in relation to the pedigree of the *Wallis* family, which the opinion of this court renders it unnecessary to state. The plaintiffs then offered in evidence a deed of bargain and sale from *William Wallis* to *Lewis Blackiston*, dated the 27th of May 1819, conveying the land in question to the latter, in fee simple. This deed also contains a general warranty of title, and a covenant for further assurances. It was

then admitted that said *Lewis Blackiston* left an only child, *Hannah Susannah*, who intermarried with *William Thomas*, by whom she had a son, *William B. Thomas*, her only child and heir at law; that *Lewis Blackiston* died in the year 1821, leaving a last will and testament, which was offered in evidence, and which contains the following clause: "*Item.*—I give and bequeath unto my daughter, *Hannah Susannah Thomas*, my plantation whereon I now dwell, and purchased of *William Wallis*, *Esq.*, known by the name of "*Boothby's Fortune*," or by any other name whatsoever it may be called, containing five hundred acres, more or less, to her the said *Hannah Susannah Thomas*, for and during her natural life, and at her death to her heirs, to them and their heirs and assigns forever." It was further admitted, that said *Hannah S. Thomas* died in March 1823, and her son, *William B. Thomas*, in the summer of 1832, and his father, the said *William Thomas*, in the fall following; and that the lessors of the plaintiff are the heirs at law of the said *Lewis Blackiston*, and of the said *William B. Thomas*. The *defendant* then offered in evidence a judgment obtained by confession in *Queen Anne's* county court, on the 25th of October, 1818, by *Cornelius Comeggs*, surviving obligee of *Peregrine Falconer*, who were surviving executors of *Benjamin Comeggs*, against *William Wallis*, for $2,275, with interest thereon from the 27th of January, 1807, until paid, and costs. The defendant then offered a writ of *sci. fa.*, sued out at May term, 1823, on the above judgment against *William Thomas*, the terre-tenant of *William Wallis*. This *sci. fa.* was renewed on the 15th of December, 1824, on the 20th of June, 1826, and a *fiat* was entered at October term, 1826, upon which a *fi. fa.* was issued on the 17th of January, 1827, and levied on the lands in controversy. At the May term 1831, a writ of *venditioni exponas* was issued, by virtue of which, said land was sold by the sheriff, who executed a deed to the purchaser therefor, dated the 27th of March, 1832. Under this deed the defendant holds the lands mentioned in the proceedings. To this evidence offered by the defendant, the plaintiff objected, but the court (Eccleston, A. J.,) overruled the ob-

jection, and suffered the evidence to go to the jury. To this decision the plaintiff excepted.

2ND EXCEPTION. In addition to the matters in this first bill of exceptions, the plaintiff produced *John V. Woodall*, a competent witness, by whom he offered to prove, that after said *William Wallis* arrived at age, and while in possession of said land, and long before he sold the same to said *Blackiston*. Witness had several conversations with said *Wallis*, in which he claimed said lands *by intailment*, and because his sister, *Elizabeth*, had received no part of said lands, he had given her, as a present, his note or bond for a sum of money, the amount of which witness does not recollect. He also offered to prove, by said witness, that before said *Wallis* arrived at age, witness heard him say, that he had got said land by intailment. The defendant then prayed the court to instruct the jury, that said evidence was admissible for the purpose of proving pedigree, but was inadmissible for the purpose of proving that *William Wallis* had title to the land as tenant in tail, which instruction the court gave, and to the granting of which, the plaintiff excepted.

3RD EXCEPTION. The plaintiff, in addition to the proof in his 1st and 2nd bills of exceptions, offered in evidence extracts from the entries in the debit books for *Queen Anne's* county, for the years 1747, 1754, and 1756, in each of which years is the following entry:

"*William Wallis, Dr.*	*Amo't of Rent.*
	£. s. d.
Boothby's Fortune, 500 *acres*, - - -	1 0 0."

In the year 1757, the same land and rent are charged to "*William Wallis*' widow," and in 1758, to "*William Wallis*' heirs." He also offered evidence to prove that *William Wallis*, the devisee of *Samuel Wallis*, died in said county in the year 1757, and that no land records, or records of deeds, can be found in the office of the clerk of said county, prior to the year 1707. The plaintiff then asked the court to instruct the jury, that if they shall believe, from the evidence in the case, that *William Wallis* held *Boothby's Fortune* in tail at the time of

the recovery of the judgment of *Comeggs vs. Willis*, that said judgment bound no other than his interest in said land at the date of the judgment, and that the proceedings under said judgment conveyed no greater interest in said lands than the interest of said *Wallis* at the rendition of said judgment, which instruction the court refused to give, and to this refusal the plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Magruder, Martin and Frick, J.

George Vickers, R. B. Carmichael and M. Brown, for the appellants, contended:

1st. That the deed in fee from *William Wallis* to *Lewis Blackiston*, of the estate tail of said *Wallis*, did not operate to let in as a lien and incumbrance against said land the judgment against said *Wallis*, for a longer period than the life of said *Wallis*.

2nd. That the evidence of the judgment against *Wallis*, the *sci. fas.* against *Thomas*, the terre-tenant, the *fi. fa.* and *vendi. exponas*, the sale by the sheriff, and his return and deed to the purchaser, were not admissible to prove that the title in fee to said land was sold and conveyed to such purchaser.

3rd. That the levy, sale and conveyance by the sheriff, transferred to the purchaser only the life estate of *Thomas*, the terre-tenant.

4th. That there was error in refusing to admit the testimony of *Woodall*, in reference to the declarations of *Wallis*, as to the quality of the estate held by him in said land.

Ricaud, Price and Spencer, for the appellees, contended:

1st. That the court were right in allowing the evidence in the first bill of exceptions to go to the jury, because it was legal and competent testimony under the issue, as it tended to prove the defendant's title to the land.

2nd. That the testimony in the second bill of exceptions, to

prove the character of the estate held by *Wallis*, in said land, was properly rejected, because the same was only hearsay.

3rd. The court were right in refusing the prayer of the plaintiffs, contained in their third bill of exceptions, because the deed for said land from *Wallis* to *Blackiston*, in fee, subsequent to the rendition of the said judgment, rendered the said land, in the hands of the purchaser, subject to all the prior incumbrances of the tenant in tail, and, therefore, subject to said judgment.

MAGRUDER, J., delivered the opinion of this court.

It appears from the record now before us, that the plaintiffs instituted, in *Queen Anne's* county court, an action of ejectment to recover a tract of land called "*Boothby's Fortune*," granted in fee on the 1st day of February, 1695, to one *Thomas Jackson*. A trial was had, and the defendant obtained a verdict. In the course of the trial, three exceptions were taken by the plaintiffs; and wherein (if at all,) the court below erred, according to these exceptions, it is for this court now to decide.

Of the land in controversy, granted as aforesaid, one *Samuel Wallis* is supposed to have died seized in fee, and his will, dated the 19th September, 1717, is to be found in the first bill of exceptions. By this will, the testator devises to his son, *William Wallis*, the tract of land, aforesaid, called "*Boothby's Fortune;*" and in a subsequent clause he declares it to be his will, that "if his son *William* should die without issue, then the survivors of his sons (previously mentioned,) shall have the aforesaid land, equally to be divided between them." Much oral testimony is introduced into the bill of exceptions, but of this we shall take no notice, as the questions of law which we are to decide, do not at all depend upon it. Next is produced, by the plaintiff, a deed executed on the 25th May, 1819, by another *William Wallis*, (the then tenant in tail of the land in controversy, it is supposed,) conveying this land *in fee* to *Lewis Blackiston*.

Thus far, there can be no disagreement between the parties before us about the title to this land now, whatever may be the

case in any other trial. Both must assume that the bargainor in that deed was, at the time of its execution, the tenant in tail, and thereby destroying the estate tail, as the plaintiffs undertake to derive their title from the bargainee in that deed, and the defendant claims the land simply because of the execution of that deed. The ground taken by the latter is, that at the time of this conveyance, there was an unsatisfied judgment against the then tenant in tail, (the bargainor in the deed,) and that the deed destroying the entail, and creating an estate in fee, that judgment was a lien upon the estate thus created or enlarged. He then shows a sale of this land in satisfaction of that judgment, and would thus prove himself the owner of the land.

The first question, then, to be decided is, whether, if there be a judgment against a tenant in tail, and without satisfying that judgment, he enlarges his estate tail into a fee simple, by a deed of bargain and sale to another, that land upon which, while it was an estate tail, the judgment was no lien at all, can be sold (the fee simple,) for the payment of such judgment? The defendant maintains the affirmative of this proposition, and relies upon our act of Assembly of 1782, ch. 23, and the law of common recoveries, to sustain it. It must be admitted that this is a new case. The act of Assembly has been in force more than half a century; very many estates tail have, in the mode prescribed by it, been enlarged into estates in fee, and, until now, it is believed the idea was never entertained, that a man, by divesting himself of all title to an estate tail, and conveying it to a stranger, makes the estate of that stranger, or the fee simple conveyed to him, answerable for debts of the bargainor, with the payment of which, while it remained the debtor's own estate, it could not have been charged. Other notions have certainly prevailed, and in respect to them, perhaps, it is almost allowable to believe, that *communis opinio* (it is sometimes written *communis error,*) *facit jus.* According to *Lord Ellenborough*, (3 *M.* & *Selw.*, 396,) this *communis opinio* might furnish some evidence of the law with which we are now to deal. When so many estates tail have been con-

veyed, since our act of Assembly of 1782, to *bona fide* purchasers, who, relying on the obvious meaning of the act of Assembly, to be collected from its words, have paid the full price of an unincumbered fee simple, it may well be said, that the *communis opinio* in regard to such a conveyance, and its legal operation, was not "an opinion merely theoretical and speculative, floating in the minds of persons, but has been made the ground-work and *substratum* of practice."

But when and how did the judgment relied upon become a lien upon this inheritance? Surely not while the defendant in it had the estate tail. The question, it will be remembered, is relative to the inheritance, and whether that was ever answerable for the amount of the judgment? If there was no such lien upon this land, while the defendant in the judgment was the tenant in tail, was the lien created by the agreement to sell the land, or by the conveyance, which expanded the estate tail into an estate in fee? Surely there could be no lien of the description spoken of, which had no existence until the debtor, who had given judgment, had parted with all title, or pretence of title, to the land. It is a *concessum*, that the deed barred the estate tail of which the defendant in the judgment was seized when the judgment was rendered, and until the execution of that deed. But surely that deed did not vest in the bargainor a fee simple in the land conveyed, and unless it can be made to appear, that at the time of the rendition of the judgment, or afterwards, the defendant therein had a fee simple, no title to this land could be acquired under the judgment which would not have expired when the defendant died. The act of 1782, does not, in express words, make the judgment a lien upon this fee, or, it would seem, benefit the judgment creditor in any way whatever, unless it be that it enables the tenant in tail, by a sale of the inheritance, to procure the means of discharging this debt. It is said, however, that a former mode of barring estates tail (by common recovery,) did let in such incumbrances. Be it so; but this estate tail was not barred by any such mode, and, therefore, it does not aid the plaintiff's case at all to show, that if in this case there had been a com-

mon recovery, then this incumbrance would have been let in. This was one of the *incidents* to that mode of assurance, but it is no incident to the deed of bargain and sale; nor is it incident to an estate tail, that every mode of defeating it shall have such effect. It has been said by this court, in 1*st G. & J.*, 128, that "the ancient mode of docking estates tail by common recovery, is abolished by the act of 1782;" and *Chancellor Kent*, in his *Commentaries*, says, "the law of common recoveries, in those States which have made laws like our act of 1782, has become obsolete." If so, and there is no more recent legislative enactment declaring this, which was an incident to a mode of assurance no longer in force, to be an incident to that conveyance which the legislature has substituted in its place, it would be difficult to prove that this must be an incident to a deed of bargain and sale, which destroys an estate tail, because it was incident to another mode of accomplishing the same object, until that mode of accomplishing it was abolished by act of Assembly. *Chancellor Kent*, speaking of common recoveries, says, they were given "by a bold and unexampled stretch of judicial legislation." Had it been given by those who alone can rightfully legislate, we should have heard of no such incident to common recoveries. But legislation *in fraud of the rights of the legislature*, is very apt to produce results not anticipated by *judicial* lawmakers. "Hence it was that a common recovery suffered by a tenant in tail, lets in all his preceding incumbrances, and renders valid all the acts of ownership which he has exercised over the estate tail." In *5th Cruise*, 493, ch. 9, we are told how this became an incident to a common recovery: "The judgment in a common recovery being of equal force with that which is obtained in an adversary suit, operates as an estoppel or record against all those who are parties to it, and concludes them from averring any thing against it." "The recoveror derives an estate in fee simple out of the estate tail, and also all those acts which bound the tenant in tail, will also bind the recoveror, *who cannot aver that the person against whom he recovered, had an estate tail.*" Surely it cannot be pretended, that a man who takes a deed

which he is expressly authorised by our act of 1782, to take from a tenant in tail, is thereby estopped from denying that the tenant in tail had the estate, and only the estate which the law authorises him to convey.

But, for the words "shall be good and available to all intents and purposes, against all and every person and persons whom the grantor, bargainor, or vendor might or could debar by any mode of common recovery," &c., (which words are to be found in the act of 1782, ch. 23,) it is presumed that no one could easily persuade himself that the enlargement of an estate tail into an estate in fee, (as authorised by that act,) would give to the creditor of the bargainor any incumbrance, charge or lien to which he was not otherwise entitled. Any person seized of any estate tail in possession, remainder or reversion, is authorized by any mode of conveyance spoken of in the law to convey to his grantee an estate in fee. The power to convey, and thereby enlarge the estate, is given to the tenant in tail, to be exercised by him in that and no other character. In thus conveying, he parts with all his estate, and conveys a fee simple, although of that estate he never had been, and never may be seized. The words of the law do not express its meaning, if they can be made to give to any other than the grantee, an estate which he could not have claimed, but for the deed. But, then, the act of Assembly, in its concluding words, speaks of those who could then be debarred by a common recovery. These words, it may be thought, merely introduces a new, more convenient and less expensive *common recovery*, with all the incidents of the more ancient and inconvenient mode. Why use those words, when, if they do not let in the incumbrances as formerly, they are supposed to be superfluous? And then we are told that we must find a meaning for, and give effect to every word in a law, if it be possible. It may be, indeed, that these words may not have been indispensable, in order to give full effect to the intent of the legislature, but then it must be permitted to our lawgivers, sometimes, to use *ex abundanti cautela*, words not absolutely necessary; and does not there seem to be some good reason for

such caution in this law? All common recoveries have not the same legal operation. Sometimes a common recovery may answer its purpose, although suffered with a single voucher; but, in many cases, it must be suffered with at least a double voucher, or it only bars the estate of which the tenant in tail is actually seized at the time, not estates in remainder. *Watkins on Conveyancing*, *p.* 69. "There are many niceties," *Wooddeson* tells us, "on these subjects." It was the policy of the legislature to unfetter the landed property, and make it a subject of absolute alienation, and but for these words, lawyers might have contended that a deed of bargain and sale, or other conveyance of an estate tail, would only perform the office of a fine, or of a common recovery, with a single voucher. Although it was evidently not the intention of the legislature not to let in the incumbrances, it was wise in them to introduce these words, and thereby "prevent contentions and mischiefs to the disquiet of the law."

It is contended, in behalf of the defendant, that although this be the law, yet there was no error committed by the court below, for which the first exception can be reversed. The exception is taken to a decision by the court, that the testimony offered by the defendant was admissible, and because, notwithstanding the plaintiff's objection, the court suffered it to go to the jury. This testimony, thus suffered to go to the jury, consisted of the judgment against the tenant in tail, *(Wallis,)* a revival of that judgment by *sci. fa.*, the sale of this land under a *fi. fa.* issued thereon, and its purchase by a person from whom the defendant attempted to derive title. For what purpose the testimony was introduced, or the grounds upon which it was objected to, the exception does not tell us; and it is said, if for any reason it is admissible, the court below was right in suffering it to go to the jury. Now this will not be denied. The evidence, however, must relate to the issue, and in this case the defendant's testimony, if admissible, must have a tendency to prove title in the defendant, or, more properly speaking, title out of the plaintiff. According to the opinion already expressed, the testimony now under consideration had no such

tendency. But the defendant, it is said, might have had other testimony. Certainly; and testimony, too, which was as valuable to him as it has been suggested it might be. But, the objection made to the testimony which was offered, if sustained, would not have prevented the defendant from offering any other, and, in truth, we cannot know that he did not obtain the verdict because of testimony before the jury which is not in this record. The existence of other testimony (whether before the jury, or not yet submitted,) could not authorise the admission of this proof. We, therefore, think the court erred in suffering it to go to the jury.

In the course of the argument, much was said about the proceedings on the judgment, and many of these proceedings were objected to, and many authorities, too, were cited, to show what were defects in the proceedings by *sci. fa.*, and how and when these objections, if sustainable at all, ought to have been made. The opinion of the court, already expressed, renders an examination of these several questions, and the authorities relied on, unnecessary to the plaintiffs. It was not understood that the defendant supposed that his case was made at all better by the issuing of the *sci. fa.*, and the proceedings thereon, than it would have been if no *sci. fa.* had been necessary, if the original judgment had been kept alive, and the *fi. fa.*, under which the land was sold, had been issued upon that, and not after a *fiat*. According to the opinion already expressed, the land in controversy was never answerable for this debt, and a sale of it was not authorised by any process issued after the death of the tenant in tail.

There remains one other exception, (the second,) which will briefly be noticed. The plaintiff offered to prove what *William Wallis*, the tenant in tail, had been heard to say, his declarations in his life time, and, among other things, that "he had got the land now in controversy by intailment." The court was asked, by the defendant's counsel, to say, and did say, that these declarations were admissible *for the purpose of proving pedigrees*. So far the exception presents nothing to be noticed by us. But, an exception is taken by the plaintiff to a further

iustruction given by the court at the instance of the defendants, that these declarations by *Wallis*, were not admissible *to prove his title to the land as tenant in tail.* We can perceive no error in this instruction. Estates tail are created by deed or will, which must be produced, or a proper foundation must be laid for presuming that they existed. The existence of them is not to be proved by oral testimony of this description. We have not forgotten the reference which was made to 1*st Greenleaf on Evidence*, *sec.* 109, "that declarations in disparagement of the title of the declarant, are admissible." But, without stopping to enquire when, about what, under what circumstances, or in what sections of our country such declarations can be received, we say, that these declarations by *Wallis* were inadmissible to prove, in this suit, anything about his title. If there had been admissible testimony (title papers,) to prove that he was, at the time of those declarations, seized in fee of the land, no declarations made by him, whether before or after the deed to *Blackiston*, or while under age, or when of age, could take from him his fee simple, and give him a fee tail estate for life, or for years. If, on the other hand, he had not the evidence which the law requires of his title, how could any declarations which he might make, be *in disparagement* of his title?

Reversed on 1st and 3rd exceptions. 2nd exception affirmed, and procedendo awarded.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

WILLIAM H. MARRIOTT, SURVIVING EXECUTOR OF JOHN McKIM, JR., *vs.* SAMUEL J. K. HANDY AND WIFE, AND JOHN M. DUNCAN AND WIFE.—*June*, 1849.

This court passed a decree reversing an order of the court below, and remanding the cause, but delivered no opinion. HELD: that what was decided by this court in that case will appear from the decree, and not by a reference to the points made and argued by the counsel of either of the parties.

At the instance of legatees, the orphans court sent to the county court issues for trial; 1st, whether *D*, one of the executors, executed a certain mortgage to the testator in his life time; 2nd, whether this mortgage had been released in due form of law; and 3rd, whether the money due by it had been paid to the testator in his life time. HELD: that *M.*, the co-executor of *D.*, should be made a co-defendant with him in the trial of these issues.

The cause being remanded by a decree of this court, directing *M* to be made such co-defendant, and it appearing that *D*, the debtor executor had died pending the former appeal, and that *M* had made return of the mortgage debt alleged to be due by his deceased co-executor, it was HELD: that the trial of the above issues was no longer necessary.

The decree of this court, remanding the cause on the former appeal, was similar to a *procedendo* in any other case. Upon the return of the cause under it, the orphans court might have changed the issues, or added others, if found necessary.

When the court below is in possession of a cause under a *procedendo*, it can entirely change the issues, make a new case, convert an action of slander into an action of trover, or upon a promissory note, notwithstanding the words of the writ directing the court to proceed in the case as if no trial had taken place, or appeal prosecuted.

A receipt by a mortgagee, acknowledging that he has received the mortgage debt in full, is an equitable release of the mortgage, and the absence of a formal release under seal, could not make it the duty of the executors of the mortgagee to return the mortgaged property as part of the assets of their testator.

Appeal from the Orphans court of *Baltimore* county.

This case originated in a petition filed in said orphans court, on the 22nd of July, 1846, by the appellees, *Handy and others*, as legatees and persons interested in the settlement of the personal estate of *John McKim, Jr.*, against the executors on said estate, *Marriott* (the appellant,) and *David J. McKim*, now deceased. This petition alleged debts to be due the estate by both of said executors, which had not been returned by

them; that the debt due by the said *David*, was a mortgage executed by him to his said testator, on the 1st of May, 1840, conveying certain household effects, &c., to secure the sum therein mentioned, of $6,900, as the rent of a dwelling house of the said testator, occupied by his said son *David*, and praying for a return of an additional inventory and list of debts, and for the passage of a final account by said executors. It also states that said executors intend relying upon a receipt of the said testator as a discharge of the mortgage, which, it avers, cannot discharge a debt evidenced by a sealed instrument.

The answer of the said *David*, admitted the execution of said mortgage, yet wholly denied that any debt was now due thereby, from him to the testator, and averring that nothing had been due on it, he exhibited and relied on a receipt in full for the said mortgage claim executed by said testator, as a bar to said claim, and a full justification for the non-return of said debt. The answer of *Marriott*, the co-executor, did not admit the existence of the alleged debt, and founded his denial upon the declaration of the testator in his life time, that his said son *David* owed him nothing upon said mortgage claim; and also upon his own personal knowledge that the said receipt in full for said claim, executed by said testator to the said *David*, was made and executed at the instance and direction of the said testator, to discharge any claim that might appear to be due by said mortgage.

The petitioners then prayed that three issues might be sent to *Baltimore* county court for trial. The 1st related to the execution of the mortgage; 2nd, whether the mortgage had been released in due form of law; and 3rd, whether the money due by it had been paid to the testator in his life time. The executor, the said *David*, also prayed an issue on the single question, whether there was, at the death of the said *J. McKim*, any debt due by him to said *J. McKim*, under or by virtue of said mortgage.

On these petitions the orphans court, by their order of the 28th of April, 1847, directed the said issues to be sent for trial, as prayed, and also directed that in the trial of said issues, the

said petitioners should be plaintiffs, and the said *David J. McKim* the defendant. From this order an appeal was prayed by the petitioners, and this court, (DORSEY, J., dissenting,) at December term, 1847, reversed this order and remanded the cause.

The decree of this court, reversing said order is dated the 30th of March, 1848, and decrees "that there was error in the decree of the orphans court of *Baltimore* county, of the 28th of April, 1847, in not joining *William H. Marriott*, one of the executors of the late *John McKim, Jr.*, as a co-defendant with the said *David T. McKim*, the other executor of the said *John McKim, Jr.*, and that, therefore, so much of the said decree be, and the same is hereby reversed, with the costs," &c., "and that the said cause be, and the same is hereby remanded to the said orphans court, for the correction of the said error, making the said *W. H. Marriott* a party to the issues in the said decree mentioned, and for such other and further proceedings therein, as may be just and necessary."

The cause being thus remanded, the petitioners, on the 19th of June, 1848, filed another petition suggesting the death of said *David*, and praying that said issues might be sent for trial, as aforesaid, and *Marriott*, as surviving executor, be made defendant. *Marriott*, in his answer to this petition, after referring to the previous answers and proceedings, as showing that said issues related solely to a debt alleged to be due from his said co-executor, states, that being made a party to the proceedings by the original petition, he did not deem it necessary for him to have made return of said mortgaged property or debt; because, from the facts stated in the original answer, and especially the execution of the receipt in full by the testator, he believed there was nothing due the estate thereon, and because the debt being alleged to be due from his co-executor, it was, by law, the duty of said co-executor, if so indebted, to give in the claim, which thereby became assets in his hands, for which his bond was liable, and that the said debt being denied by his said co-executor, he, (*Marriott,*) as co-executor, had not the right, by any return of the debt made by him, to charge his

said co-executor with said debt, nor any power to institute any suit or proceeding against his said co-executor, for the recovery of the same; but, on the contrary, in case of a denial or refusal to give in a debt, by an executor alleged to be indebted, the law provided a special mode of proceeding, at the instance of any one interested in the estate, against said executor, by which the debt is established, became assets in his hands; and, therefore, he was neither required nor justified in retaining said debt, without the concurrence of his said co-executor, and in the face of his denial of the debt. The answer, then, admitting the death of said *David*, by which respondent was left sole executor, states, that by this event he is advised the position of the controversy is materially varied, and that he ought now to make such a return as will enable him, or the parties interested, to take the necessary steps to establish or recover the same. It then states that said *David* gave a separate bond as executor, amply sufficient to secure what may be due upon it, and that letters of administration had been granted on the estate of said *David*. It then adds, that by the death of said *David*, all privity between his estate and that of *McKim*, the testator, is so far ended, that the only course for the determination of the said claim, is by legal proceedings against the administrator of said *David*, or on his said bond, or against the mortgaged property; and that the trial of said issues, without making the personal representatives or sureties of said *David* parties, would be wholly unavailing as to them, and that the necessity and legal propriety of trying, under said issues, the questions involved in the same, has ceased, since by the death of said *David*, his personal representatives or sureties are liable to legal proceedings for the trial of the same, by the surviving executor, or those interested in the estate, and cannot be made parties to this proceeding. He, therefore, makes return of the debt claimed to be due under said mortgage, and submits that this return having been made, the trial of said issues is not necessary or legally proper, in order to the determination of the existence of said debt.

This return accompanies the answer, and makes return of

the mortgage debt, and returns as to the property mortgaged, that said *David* retaining possession after the mortgage, remained in possession until his death, denying the mortgage debt, and that the property, or what remains of it, passed to the hands of his said administrator, who claims the same, and denies that there is any debt due under the mortgage, and that he can make or return no inventory of the same, until he can obtain possession of the same by legal process, or otherwise, and for this purpose he submits himself to the direction of the court.

To this answer a replication was filed, reiterating the former allegations as to the existence of the debt, and the legal insufficiency of the receipt to discharge it, stating, in detail, the former proceedings, and setting out and relying upon the decision of this court on the former appeal, and the order remanding the cause, and insisting on the sending and trial of said issues with the appellant, as surviving executor, as the sole party thereto. And said orphans court, by their order of the 13th of September, 1848, ordered that the said issues should be transmitted for trial, and that the appellant, as said surviving executor, should be the party defendant thereto. From this order the present appeal is taken.

The cause was argued before Dorsey, C. J., Spence, Magruder, Martin and Frick, J.

By R. Johnson and McMahon, for the appellants, who insisted:

1st. That as the said petition, and the issues prayed for under it, did not relate to any debt due by the said appellant, as executor, nor to any assets of the estate in his hands, but *solely* to a debt due and claimed from his said co-executor, *David*, and denied by said *David*, and to the property mortgaged therefor, remaining in the possession of said *David*, until his death, and passing, at his death, to his administrator holding possession of the same, and contesting said debt; and as the said issues relate exclusively to the existence of said debt, the result of the death of the said *David*, by the removal of the party to be charged

with said debt, was to render the trial of said issues, against the appellant alone, unnecessary, as insufficient to bind the party to be charged with the finding under said issues, or the results thereof, and unauthorised by the acts of Assembly, relative to such issues.

2nd. That even if this were not so, the whole object of this proceeding as to the appellant, the co-executor, have been substantially gratified, and the trial of said issues, as to him, rendered unnecessary and legally improper, by his aforesaid answers and return, and his submission thereby, to any order of the court, might deem it proper to pass, as to the collection of said debt, and the recovery or return of said property.

3rd. That under the altered state of the case, produced by the death of said *David*, and the aforesaid answer and return of the appellant, the former decision of this court was not conclusive as to the right of the petitioners to the trial of said issues, after said occurrences; or as to their right to the trial of them as against the appellant, as the *sole* party defendant.

HANDY and NELSON, for the appellees, insisted:

1st. From all the circumstances of this case, as disclosed by the record of the proceedings, the said appellees and petitioners are legally entitled, as a *matter of right*, to have their issues aforesaid sent to *Baltimore* county court, as a court of law for city business, for trial, against the said *William H. Marriott*, said surviving executor of said *John McKim, Jr.*, and this court *must affirm* the said decree and order of the said orphans court, bearing date the 13th of September, 1848, the same being in compliance with the said decree of this court, passed in this cause, bearing date the 30th of March, 1848, and made a part of this record of appeal.

2nd. This court, by its decree passed in the said former appeal, having directed the said issues to be sent to *Baltimore* county court, aforesaid, for trial, with directions to said orphans court to make the said *William H. Marriott* a party to the said issues, and for such other and further proceedings as might be

just and necessary, the question presented by this appeal is not *now* an *open* question, the same being *res adjudicata*.

MAGRUDER, J., delivered the opinion of this court.

What was decided by the court, on the former appeal between these parties, will appear by the decree then passed, and not by a reference to the points made and argued by either of the parties. This court determined, and could only determine, that so much of the order of the court below "as excluded the said *William H. Marriott* from being a co-defendant in the trial of said issues in said county court, be reversed, and simply directed the said orphans court to make the said *William H. Marriott* a party to the said issues, to be sent and tried in the said county court."

Touching any other matters in controversy between these parties, the court intimated no opinion. It was simply a decision by this court, that in the trial of issues like these, it is usual and proper to make all the executors parties to defend, and in this case the usual practice should not be departed from. It did not, and could not provide for events not to be foreseen; such as the death of any of the persons, by the decree required to be made parties.

The death of *McKim*, the other executor, certainly puts it out of the power of the court below to name the original parties as the parties when the issues are to be tried, to make *Marriott* a co-defendant, as the individual whose co-defendant he was to be, can no longer be associated with him, and especially as this court was bound to know that *Marriott* was, in *interest*, a co-plaintiff.

It is insisted by the appellant, that although it might be proper, while the other executor was alive, to make the appellant a co-defendant, yet, in the trial of the matters now in controversy, (if a trial of them has not become unnecessary,) he cannot, with any propriety, be made sole defendant, if a defendant at all. Surely, in order to decide this simple question, it is not necessary for us to examine all the matters in controversy, which have existed, or may arise between these parties. Is-

sues are to be directed and tried, when the facts in issue must be ascertained before the court can pass any order properly required of it, and when the court is authorised to pass some order grounded in whole or in part upon the facts to be found and ascertained by the trial of the issues.

What is the matter of complaint in this case? Simply that one of the executors (the one now deceased,) was indebted to the testator at the time of his death, and to secure the payment of that debt, had executed a mortgage to the creditor, and that of this debt, and of the property conveyed by the mortgage, no notice was taken by the executors, in their inventory, of the property or lists of debts due to the deceased returned by them to the orphans court. The executors answered, and set forth their reasons for not returning a debt which, as they supposed, had no longer existence. Issues were directed, and the next matter in dispute was, whether *Marriott*, who was an executor, though not the debtor executor, should be a party defendant. Of this question this court has disposed, as stated already. *McKim*, who, by the order of this court, was to be a defendant, has died, and now the question is, who can properly be defendants in the trial of these issues, if, for reasons hereafter to be stated, it be not unnecessary to try them?

It would seem that a trial of those issues is quite unnecessary. If, in the trial of them, *Marriott*, and *Marriott* alone, is to be a party defendant, no verdict which could be rendered, would establish the claim against the estate of *David T. McKim*, no person having an interest in that estate being a party to the trial.

If it be said that *Marriott* was bound to return the debt before the death of his co-executor, the answer is, that there is now no such question before the court below, such a question can only rise in an action upon his testamentary bond, or in some other form to be instituted elsewhere. If it be contended that the trial of those issues is necessary to enable the court below to decide whether *Marriott* ought not now (and when he is sole executor,) to be directed to make such a return, the an-

swer is, that any such order has become unnecessary, inasmuch as the return has been made by him.

It has been said, indeed, that the return now made is defective, inasmuch as it does not state whether the debt is sperate. The appellant says, and this is no where denied, that he conscientiously believes that the debt does not exist, and he believes that the debt does not exist, and he believes it because the creditor, in his life time, so informed him, and he has seen a receipt in full executed by him. It would be difficult to say of such a debt, that it is either sperate or desperate. The case, indeed, is a very extraordinary one. It is not denied that the debt has been paid. If the creditor is to be believed, he has declared it in conversation, and also in the form of a receipt in full, and it will be a singular issue, if, in the trial of it, each party is to rely on the testimony of the other, to discredit his own declarations. There seems to be a misconception of the order of this court passed on the former appeal, which, it seems to be thought, took from the court below the power, in any respect, to change their order, further than by directing the name of *William H. Marriott* to be inserted in it as a co-defendant. This surely is a mistake. This court has never decided that a trial of those issues is necessary, in order to the correct determination of the matters in controversy between the parties. It has decided nothing, except that *William H. Marriott* ought to be a co-defendant. To make the decree upon the former appeal intelligible, it may be likened to a *procedendo* issued in any other case which directs the court below to proceed in the cause as if no trial had taken place, or any appeal had been prosecuted. Yet no body doubts that, notwithstanding the words of such a writ, the court below, when in possession of the case, can change entirely the issues, may make a new case, can convert an action of slander into an action of trover, or upon a promissory note, and therein is manifested no disobedience to the superior court; so, upon the return of this case to the orphans court, other issues might be found necessary; and if so, might rightfully be added, or the petition might be altered, and this might require, in order to its deter-

mination, other issues to be framed. Indeed, according to the argument for the petitioners, a change of the issues is necessary, for now the thing of which he complains is not that no return of the alleged claim has been made, but that the return is not in every respect conformable to the act of Assembly.

The truth is, that pending the controversy which gave rise to these issues, the case has been changed, and is like a case sent back by a proceeding, in which, pending the appeal, or in consequence of the decision of the court above, the party impleaded has done everything which he is required by his adversary to do.

It is made known to us, by the parties, that the controversy is between members of the family of *Mr. McKim*, claiming as legatees, and his executors, the former alleging that a debt due from one of the executors to the testator, ought to be returned to the orphans court, and the other relying on *Mr. McKim's* receipt for the debt. *Its* genuineness is not questioned, nor is a doubt intimated that the testator, when he executed it, understood its contents. The truth of the matter alleged by the testator himself, is the only thing denied, and the only question between the parties seems to be, whether this receipt, although it may have been executed by the creditor himself, with a knowledge of its contents, and of his own free will, is to have all the effect which it seems to be admitted it would have had, if, when the creditor signed, he had also sealed it. Without undertaking to decide a question which is not before us, we have stated what it seems the question really is, and will add a reference to 1*st Greenleaf on Evidence*, *sec.* 305, and the authorities there cited.

The petition which gave *rise* to this appeal, was filed by the appellees on the 19th June, 1848. It makes known to the court the death of *David T. McKim*, and asks that the issues aforesaid, as framed by petitioners, may be transmitted to *Baltimore* county court for trial, and that *William H. Marriott*, as surviving executor of *John McKim, Jr.*, be made defendant therein. This petition is answered by *Marriott*, who therein states what he has done since the death of his co-executor. He has

done that which the original petition required to be done, and, therefore, a trial of the issues is unnecessary. To this, there is a replication which shows that the matter in controversy, and the admissions made by the parties, requires no matter of fact to be astertained, the simple question in the case being whether a receipt in full, given by a father to his son, is *nudum pactum*. It is certainly no question whether the mortgagee can claim both the mortgage debt and the mortgaged premises. If the mortgagee chooses to be satisfied, and acknowledge, by competent testimony, that he has received the debt in full, this is usually treated as an equitable release of the mortgaged premises; and the absence of a formal release, and under seal, certainly, under such circumstances, could not make it the duty of the executors to return the mortgaged premises as a part of the property of their deceased testator, to be distributed among his legatees.

The court below, therefore, in its order of September, 1848, erred in directing *those* issues to be transmitted to the county court for trial, notwithstanding the death of *David T. McKim*, and the return then made by the surviving executors, and that in the trial of those issues, *William H. Marriott, as the surviving executor of John McKim, Jr.*, be defendant. This court will sign a decree reversing the order with costs, and dismissing bill.

DECREE REVERSED.

William B. Dail, *vs.* Devereux Traverse.—*June*, 1849.

The 10th section of the act of 1799, ch. 79, requiring sheriffs, and other officers, in cases of injunctions issued to prevent their selling personal property taken in execution, to return the same to the party from whom it was taken, does not require nor warrant such officer to return money received from the sale of such property so taken, to the person on whose property the levy

was made, where such sale has been consummated anterior to the issuing of the injunction.

A sheriff sold personal property under an execution, and received the money therefor. An injunction then issued suspending further proceedings under the *fi. fa.*, "until the further order of the court." Afterwards, upon application of the party whose property had been so sold, the county court passed an order directing the sheriff to pay said proceeds over to him. HELD: that there was error in this order, because the injunction had not been made perpetual.

Appeal from *Dorchester* county court.

A writ of *fi. fa.* was issued out of said county court on the 24th of April, 1844, upon a judgment recovered in said court by *Wm. Conner*, as administrator of *Wm. Conner*, deceased, for the sum of $5,529, and $159.27 costs. This writ was laid upon certain negroes, the property of *Traverse*, the defendant in the judgment, which were sold by one *Thomas Hayward*, as agent of said *Traverse*, with the permission of the sheriff, with the understanding and agreement of said *Traverse* and *Hayward*, that the proceeds, amounting to $2,000, should be paid said sheriff, on account of said execution, which was accordingly done. Afterwards, on the 20th of June, 1844, *Traverse*, the defendant in the judgment, filed his bill on the equity side of said court, setting up certain equities against said judgment, which it is not material to state, and averring that nothing was due on account thereof, and praying for an injunction restraining the further execution of said judgment; and, on the same day, an injunction was granted, directed to *Wm. B. Dail*, the sheriff, and *Conner*, the plaintiff, enjoining them from issuing or enforcing any execution on said judgment "until the further order of this court." This injunction was duly served upon the sheriff.

On the 14th of April, 1845, *Conner*, the plaintiff, moved the court for a rule upon the sheriff to make return of the money received by him, as above stated, and to show cause why he has not paid the same over in part satisfaction of said execution. On the 2nd of June following, the court discharged this rule; and on the 13th of October following, the defendant, *Traverse*, applied to the court for a rule upon the sheriff, to shew cause

why the said sum of money, remaining in his hands, should not be applied for the benefit of said applicant, stating in his application the facts above stated in relation to the injunction. The sheriff resisted this motion, among other reasons, on the ground that said money was received by him in his individual capacity, and not by virtue of his office; and further, that he would be liable to pay the same over to the plaintiff in the judgment, whenever the said injunction should be dissolved. But the court (GOLDSBOROUGH, A. J.,) passed an order directing the sheriff to pay said sum over to the defendant, *Traverse*. From this order the sheriff appealed.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER, MARTIN, and FRICK, J.

JAMES A. STEWART, for the appellant, insisted:

That the sheriff held the money in his individual capacity, and was not subject to the summary order of the court, and that the only remedy against him was by a regular suit or action at law.

LE COMPTE, for the appellee, contended:

That by the injunction, the right of the sheriff over the property of the appellee ceased, and he was, therefore, entitled to have again the said property, and the money for which said negroes had been sold.

DORSEY, C. J., delivered the opinion of this court.

It appears by the record before us, that, on the 21th of April, 1844, a *fieri facias* issued out of *Dorchester* county court, to the sheriff of that county, on a judgment in said court rendered against *Devereux Traverse*, in favor of *Wm. Conner*, administrator of *Wm. Conner*, deceased, for $5,529, and $159.27 costs. That intermediate the issuing of the said execution and the 20th of June, 1844, when an injunction issued suspending, until the further order of the court, all further proceedings under the *fieri facias*, *Wm. B. Dail*, the sheriff of the county,

to whom the execution was delivered, had levied the same upon certain negroes of *Devereux Traverse*, and that by agreement between the sheriff and *Traverse*, a certain *Thomas Hayward*, the agent of *Traverse*, had sold the negroes, and paid to the sheriff the sum of $2,000, the proceeds of sale on account of the execution. The bill of complaint, on which the injunction issued, denied that anything was due on the judgment; and it no where appears in the record that the injunction is not still in full force.

On the 14th of April, 1845, *Conner*, the administrator, filed his petition in the county court, praying that a rule might be laid upon the sheriff, to make a return of the amount of money so received by him, and to show cause why the same had not been paid over in satisfaction of the execution. To which application the sheriff made a return showing the amount by him received, as aforesaid, and that it remained in his hands, ready to be paid over or applied as the county court might direct. The rule to show cause was, on the 2nd of June, 1845, discharged. Upon what ground the court's decision was made, does not appear; but it is presumed that it deemed it improper to pass the order required, during the continuance of the injunction.

On the 30th of October, 1845, *Devereux Traverse* applied to the county court for a rule upon the sheriff, to show cause why the said sum so remaining in his hands, should not be paid to the applicant, or otherwise appropriated to his benefit; and on the seventh day of November following, the county court ordered that the said sum of money be paid over to the said *Devereux Traverse*. From that order the present appeal hath been brought before this court, by *Wm. B. Dail*, the sheriff. If the injunction had been made perpetual, the order appealed from would have received our entire approval, as, under the circumstances in which the money came to his hands, the sheriff would not have been listened to for a moment, in saying that it was not received by him in his official capacity. To countenance such a denial, would be a precedent of dangerous tendency, and would give sanction to a gross violation of offi-

cial faith and duty, not to say to a fraud. If this order can be sustained at all, it must rest for its support upon the 10th section of the act of 1799, ch. 79, which declares, "and whereas it sometimes happens that an injunction from the court of chancery prevents the sheriff from proceeding to sell, after he hath taken in execution property of a perishable nature, and doubts are entertained respecting the power, duty and liability of the sheriff, and whatever the law may be, great inconveniences must arise to one of the parties, or to the sheriff, whether the injunction be afterwards dissolved, or decreed to be perpetual; be it enacted, that in case any injunction from the court of chancery shall hereafter issue, to prevent a sheriff or other officer from selling personal property taken in execution, immediately on the service of such injunction on the sheriff or other officer, he shall deliver back the property so taken in execution, to the party from whom it was taken, and shall not be answerable to the plaintiff or plaintiffs at law, on account of the same; and in all cases where personal property hath been taken in execution, and the sheriff or other officer hath been prevented, by injunction from the chancery court, from selling the same, the sheriff or other officer may deliver the same, if in his possession, to the party from whom it was taken, and shall not be answerable for the same to the plaintiff or plaintiffs at law."

It is apparent that this enactment did not require nor warrant a sheriff or other officer, who had received money from a sale of personal property taken under a *fieri facias*, to return the same to the person on whose property the levy was made, where such sale had been consummated anterior to the issuing of the injunction. The money received by the sheriff in this case, remained in his hands in the same condition that it would have done had the sale of the property from which it resulted, been made by the Sheriff himself, in conformity to all the formalities required by law; unless a party to the suit having a right to object thereto, saw fit otherwise to regard it. The plaintiff to the judgment against *Traverse* raised no such objection, and the defendant would not be heard in making it, the sale having been made by his agent, and the proceeds thereof paid to the

sheriff, under his sanction. Had the injunction been decreed to be perpetual, then would the court's order in favor of *Traverse*, have been appropriately passed: or, if the injunction had been dissolved, *Conner's* administrator could have required the court to have awarded a similar order in his behalf. But, whilst the rights of the parties were unadjudicated in chancery, and the injunction continued in force, the sheriff held the money in his hands as a payment made to him under the execution, and for which he was bound to respond to the plaintiff in the suit in which the execution issued, at any moment that the dissolution of the injunction might occur. It, hence, follows, that the county court erred in adopting the order appealed from. The judgment of the county court is reversed, with costs.

JUDGMENT REVERSED.

JOHN T. STEWART AND WIFE, AND OTHERS, *vs.* JEREMIAH L. PATTISON, EXC'R OF JAMES PATTISON, AND OTHERS.—*June*, 1849.

By the act of 1798, ch. 101, sub. ch. 11, sec. 6, money given to a child without a view to a portion or settlement, shall not be deemed advancement.

In proceedings in the orphans courts, exceptions to testimony deemed to be inadmissible, are not required.

He who claims to be a creditor, must take care to procure legal evidence of the contract which makes him such, for the law will not help him by any of its presumptions. If a man claims to have lent money to another, something more is necessary than proof of the delivery of the money, for this *prima facie* is only proof of payment.

If money is delivered by a parent to a child, it will be presumed to be an advancement or gift.

A child who has received any advancement from his father, in his life time, is bound to bring such advance into *hotch-pot* only in case of actual or total intestacy.

A testator gave legacies to several of his children, adding thereto the words,

"*and no more of my estate.*" HELD: that these words cannot have the effect to exclude such children from participating in the undisposed of residue of the estate; neither can they give such residue *by implication* to the other children, to whose legacies no such restriction was annexed.

A man must dispose of his property in his will, by saying expressly, or by necessary implication, to whom it shall go; not by declaring to whom it shall *not go*. The law will not sanction a disposition in this latter mode.

The law does not conclude, that because a man has determined to disinherit one child, he means that all the rest of his children should be his residuary legatees. The act of disinheriting a child, is one which the law cannot regard very favorably.

The words "no more of my estate." may be rejected as surplussage. They evidence an intent; but a mere intention will not exclude the children to whose legacies they are annexed, from their shares of the residuum of the estate.

The orphans court excluded a child from any share of the residue of the personal estate in the hands of the executor, because they were of opinion that a conveyance of a tract of land to him, by the testator, was an advancement, and greater in value than a share. HELD:

That this was error. With the real estate of the deceased, when and how he has disposed of it to his children, the orphans court has no concern. In a different form, and in a different *forum*, controversies in regard to the real estate, must be settled.

A testator gave, by his will, to two of his daughters, $1,500 each, to be paid them by their brother, to whom he devised, by the same will, certain real estate, which he afterwards conveyed to such brother by deed. HELD: that these daughters were not entitled to have this sum paid them out of the residue of the personal estate, If payable at all, it must be claimed of the devisee, who, by the will, is required to pay it.

Appeals from the orphans court of *Dorchester* county.

The several appeals in this case were taken from an order of said orphans court, distributing the personal estate of *James Pattison*, late of said county, deceased, who died in the month of September, 1844, leaving a last will and testament executed on the 9th of November, 1836, upon the construction of which, most of the questions involved in the case arose.

The testator, after directing his debts to be paid, devised and bequeathed as follows: "*Item 2nd.* I give unto my son, *Jeremiah L. Pattison*, all the lands I hold, lying and being in the county aforesaid, on *Slaughter* creek, called "*Elysian Fields*," or by any other name they may be called, to him and his heirs

forever, provided the said *Jeremiah* should pay, or cause to be paid unto his sisters, *Ann Elizabeth*, and *Margaret W. Pattison*, the sum of $3,000, say to each $1,500, to be paid in manner as follows: one fourth in six months after my decease, and one other fourth in twelve months, &c., the balance, being $1,500, to be paid in two years from my decease, if demanded, with interest on the whole till paid, and I give unto my son, *Jeremiah*, no more of my estate. *Item 3rd.* I give unto my son, *William H. Pattison*, the farm I now live on, with all the improvements thereon, also all other lands that I have given away to him and his heirs forever, provided he, the said *William H.*, should pay over unto his sisters, namely, *Emily W. Pattison*, *Henrietta J. Pattison*, *Sarah Caroline Pattison*, and *Martha Gara Pattison*, the sum of $2,000, to each $500, to be paid in four equal instalments, annually, clear of interest. I also give unto my son, *William H. Pattison*, a negro boy called *Peter Slater*, and no more of my estate, *Item 4th.* I give unto my daughter, *Sarah Caroline*, my large brick house, in the town of *Cambridge*, with all the lot, &c., annexed thereto, except the store house and doctor's shop, as now enclosed, which I give unto my youngest daughter, *Martha Gara Pattison*, to each of them and their heirs forever. *Item 5th.* I give unto my daughter, *Mary Ann*, who intermarried with *James Bryan*, $1, and no more of my estate. *Item 6th.* I give unto my daughters, *Ann E. Pattison* and *Margaret W. Pattison*, $500 to each, to be paid out of my estate, in addition to the amount their brother, *Jeremiah*, will have to pay them, and no more of my estate. It is further my will and desire, that all my daughters, as long as they remain single or unmarried, should have room or privilege in either of the mansion houses mentioned to *Jeremiah* and *William Pattison*, also privileges of yard, kitchen, &c., without molestation or hindrance. *Item 7th.* I do hereby constitute and appoint my two sons, viz: *Jeremiah* and *William H. Pattison*, my whole and sole executors of this my last will and testament. In witness whereof," &c.

On the 22nd of May, 1838, after the execution of the above

will, the testator executed a deed conveying to his son, *Jeremiah*, the same tract of land which he had devised to him by his will. This deed recites, "that in consideration of the natural love and affection which he, the said *James Pattison*, hath and beareth unto the said *Jeremiah L. Pattison*, his son, as also for the better support, maintenance, livelihood and preferment of him, the said *Jeremiah L. Pattison*, and also in consideration of the sum of $20," &c., "the said *James Pattison* hath given, granted," &c., "unto the said *Jeremiah L. Pattison*, his heirs and assigns forever, from and after the natural life of him, the said *James Pattison*, all and singular," &c., "that tract," &c., "of land lying," &c., "called and known by the name of '*Elysian Fields*,'" &c., "containing nine hundred and ninety-four and one-half acres, more or less," "and the rents, issues and profits of all and singular the said land and premises, with their appurtenances, from and after the natural life of him, the said *James Pattison*." "To have and to hold the same," &c., "from and after the natural life of him, the said *James Pattison*, his heirs and assigns, to the only proper use and behoof of him, the said *Jeremiah L. Pattison*, his heirs and assigns forever, from and after the natural life of him, the said *James Pattison*, as aforesaid."

The testator left all the children, mentioned in his will, surviving him, except "*Martha*," who died a minor, intestate, and without issue, before the death of her father, and also a widow, *Sarah Pattison*, to whom the testator was married after the execution of his will, but by whom he had no children. The above children were the sole next of kin and heirs at law of the testator, and of them, *Jeremiah L.*, *Ann*, and *Margaret*, now the wife of *James Fooks*, were children of the testator, by his first wife, and *William Henry*, *Henrietta*, now the wife of *John T. Stewart*, *Mary Ann*, wife of *James Bryan*, *Emily*, wife of *William Birkly*, *Caroline* and *Martha*, his children by a second wife.

The executors named in the will, took upon themselves the execution of their trust, but before completing the same, one of them, *William Henry*, died intestate, and without issue

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leaving the said *Jeremiah* surviving executor, who proceeded to settle up the estate, and there remaining a surplus in his hands amounting to $24,500, on the 15th of December, 1846, he filed a petition in the orphans court for a general and detailed order, directing him in what way, and to whom he should distribute said surplus.

This petition very fully and clearly sets forth the controverted questions among the parties claiming said surplus. It states that *Jeremiah*, upon the execution of the aforesaid conveyance, gave his said father his obligation for $3,000, which amount was all he ever paid for said property so conveyed to him; that this property, at the time of the conveyance, was worth about $20,000. That said *Ann Pattison* and *Margaret Fooks* maintain that they are entitled, since said conveyance, to have the sum of $1,500 (which, by the will, was to be paid to each of them by said *Jeremiah*,) paid them out of the personal estate, as legacies, at least, by implication. That the other children resist the right of said *Ann* and *Margaret* so to be considered as legatees. It further states, that *John T. Stewart*, the husband of said *Henrietta*, received from the testator, in his life time, the sum of $2,000, for which the testator took no obligation; that *Stewart* admits that the testator gave him this sum, but insists that it was an absolute and unqualified gift to him, and that the same was neither understood between him and the testator to be a debt, or in the nature of an advancement, and he, therefore, refuses to account for it as a debt, and denies that it ought to be considered as an advancement, or in any manner to affect his claim, in right of his wife, to his full share of said surplus. The other children insist that it is to be considered as an advancement, and in the distribution of this surplus, *Stewart* is not to receive so much on account thereof. That the widow of the testator insists, that this $2,000 shall be collected as a debt, and brought into the estate for distribution, one third of which she claims as her reasonable part. *Stewart* and the other children resist this claim of the widow. It is also insisted, by the other children, that the said conveyance to *Jeremiah* was an advancement, which excludes him from any por-

tion of the personal or real estate of the testator, whilst he maintains that said conveyance does not affect his rights in any distribution of the personal estate of his father. *Stewart* and wife contend, that this surplus is not disposed of by the will, and that they are entitled to an equal share thereof, and even should the said $2,000 be considered an advancement, inasmuch as it is not equal or superior to a share; in the language of the act of 1798, ch. 101, sub. ch. 11, sec. 6, they are not to be excluded from a full participation in said surplus. Whilst the other children maintain, that if said $2,000 be less than a share, that then *Stewart* and wife shall only receive such a sum as, with the said $2,000, shall make them equal with the other children, and that the same principle shall apply to said *Jeremiah*, in relation to his advancement under said deed *Stewart* and wife, *Birkley* and wife, and *Caroline Pattison* contend, they, together with the said *Martha G. Pattison*, are entitled to the whole of this surplus, as legatees by implication, because the said will provides and declares, that the said *Jeremiah L.*, *William H.*, and *Ann Pattison*, and *Margaret Fooks*, and *Mary Ann Bryan*, should have *no more* of the estate of the testator than what was expressly given to them by said will, which contains no such provision as to the said *Henrietta*, *Emily*, *Martha* and *Caroline*, and that it was the intention and design of the testator, by such language and distribution, to give said residue to them, they maintaining that said testator having executed his last will and testament, by which he appointed executors to settle his estate, died intestate, if no part of his personal estate but that, that they are the legatees entitled to receive the same, to the exclusion of the other children, or that said surplus was vested in the executors in trust, to be paid over to them as the persons entitled by said will, and by operation of law, whilst those children who would, by this construction, be excluded from participation in said estate, maintained, that this surplus should be distributed as if the said *Pattison* had died intestate, and in the distribution an account of the said advancements shall be taken.

Stewart, in his answer to this petition, in reference to the

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$2,000, states, that at the urgent and frequently expressed desire of the testator, that defendant and his family should reside near the testator, and his repeated promises that he would give defendant between $2,000 and 3,000, for the purpose of purchasing a farm in his neighborhood, which he spoke of, defendant was induced, and did, in the year 1843, purchase a farm near *Cambridge*, and afterwards called upon the testator for the promised assistance, who very promptly gave respondent the sum of $2,000, which was given and received as a gift. That the testator at no time ever called on respondent for any obligation for the same, and that he frequently told respondent that no charge whatever could be made against him, on account thereof, by testator's representatives; that it was a gift, and defendant should not be uneasy about it, as he never could be called on to account therefor.

A large number of depositions were then taken, in relation, chiefly, to the sum of $2,000 given to *Stewart* by the testator. The character and effect of the proof contained in these depositions are sufficiently stated in the opinion of this court, delivered by his honor, *Judge Magruder*.

Upon this petition, answers and proofs, the said orphans court, on the 8th of March, 1847, ordered and decreed that the said executor pay to *Sarah Pattison*, the widow of the testator, the sum of $8,166.66⅔, it being the one third part of $24,500, the amount in his hands after payment of the debts, and expenses, and all liabilities of the said estate. That he then pay to *Mary Ann Bryan*, wife of *James Bryan*, $1, the legacy left her by the will of the testator; that he also pay to *Margaret*, wife of *James Fooks*, and to *Ann Pattison*, each the sum of $500, the amount of legacies left them by said will; that to the balance thus left in the hands of said executor, to wit: the sum of $15,322.34, there be added the sum of $2,000, the amount received by *John T. Stewart*, making the sum of $17,332.34, and that this sum be divided into seven equal shares, and distributed as follows, to wit: to *Mary Ann*, wife of *James Bryan*, to *Emily*, wife of *William Birkley*, to *Margaret*, wife of *James Fooks*, to *Jeremiah L. Pattison*, as ad-

ministrator of *William H. Pattison*, to *Ann Pattison*, to *Caroline*, and to *Henrietta*, the wife of *John T. Stewart*, each the sum of $2,476.04. The court being of opinion that the said sum of $2,000, in the hands of *John T. Stewart*, was an advancement by the testator to him and his wife, by way of settlement or portion, they further adjudged and decreed that the same be considered as so much paid as his wife's distributive share, and that they receive from the executor the difference between the said sum of $2,000 and the sum of $2,476.04, to wit: the sum of $476.04, and no more, in full of the said distributive share. They further adjudged and decreed that *Jeremiah L. Pattison* be excluded from any share of the said estate, they being of opinion that the conveyance to him by the testator, in his life time, of the "*Slaughter* creek" farm, was an advancement to him, and being greater in value than a share, he is thereby excluded from any portion of the said personal estate. The court were further of opinion, and accordingly so adjudged and decreed, that the above named parties being the heirs and legal representatives of the said testator, are equally entitled to their shares of all the undisposed of personal property, there being nothing, in their judgment, in the will of said testator, to justify a different construction, or to authorise them to direct a distribution thereof to any one or more, to the exclusion of the others. The court were further of opinion, and so accordingly adjudged and decreed, that *Margaret*, wife of *James Fooks*, and *Ann Pattison*, are not entitled to claim the sum of $1,500 each, or any part thereof, out of the personal estate of the testator, the bequest thereof, in said will, being, in the judgment of said court, entirely revoked by the subsequent conveyance of the said land to *Jeremiah L. Pattison*. The costs of the proceedings were adjudged and ordered to be paid out of the estate.

Stewart and wife appealed from so much of this order as determined the $2,000, in his hands, to be an advancement.

Stewart and wife, *Birkley* and wife, and *Caroline Pattison* appealed from the part of the order which decides that they are

not entitled to the whole estate, and which makes distribution to all the heirs of said testator.

Jeremiah L. Pattison appealed from so much of the said order as decides that he is excluded, by reason of said conveyance, from any distributive share of said estate.

Fooks and wife, and *Ann Pattison*, from so much of the order as decides that they are not entitled to the sum of $1,500 each, as a legacy from said estate.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER, MARTIN, and FRICK, J.

By JAMES A. STEWART, for *John T. Stewart* and wife, appellants, and

By LE COMPTE and HOOPER, for the widow and executor, appellees, and also for the other parties, appellants.

MAGRUDER, J., delivered the opinion of this court.

In the distribution, by the orphans court of *Dorchester* county, of the personal estate of the late *James Pattison*, various questions arose, and the decision of them by the court, gave rise to these several appeals. Of them it is now designed to dispose.

There is proof in the case, that the deceased, sometime before his death, furnished his son-in-law (*Stewart,*) with $2,000. Was this a loan? Or, was it an advancement? Or, was it money given without a view to a portion or settlement? If the latter, the act of 1798, ch. 101, sub. ch. 11, sec. 6, says it shall not be deemed advancement.

There is much testimony in the case relative to this money. It is deemed unnecessary to examine it with a view to show how much of it is admissible, and the weight to which each portion of it is entitled, whether taken by itself, or in connection with the residue of the testimony. This being a proceeding in the orphans court, exceptions to the testimony deemed to be inadmissible, are not required. A judge must have a wonderful degree of confidence in his own judgment, and in

his skill, in arriving at the truth, if, of the correctness of the conclusion to which he is brought by the examination of this testimony, he could feel quite sure. Can we pronounce this to have been a loan of so much money by *Pattison* to *Stewart*? We think not. *Stewart* himself denies it, and a number of witnesses say that they have heard *Pattison* declare that he had given the money to his son-in-law. Others, to be sure, say that he spoke of it to them as a loan. But these latter declarations, when admissible, are not entitled to all the weight which is due to declarations by him, that it was a gift. Some of the witnesses say he stated that he let him have $2,000—a very equivocal phraze—the meaning of the person who uses it is very often mistaken by those who hear it. If *Pattison* intended to lend this money, he could not have been the prudent man that his neighbours and acquaintances always thought him to be. If it was intended as a gift, neither of the parties wanted any proof thereof. If it was a loan, how could it happen that the deceased did not (actually would not,) furnish himself with any proof of it? He who claims to be a creditor, must take care to furnish himself with legal evidence of the contract which makes him such. The law will not help him by any of its presumptions. The authorities tell us, that if a man claims to have lent money to another, something more is necessary than to prove that the plaintiff delivered money to the defendant, and that this *prima facie* is only proof of payment; and in *Heck vs. Keates*, 4 *B. & C.*, 71, it was said, that if money is delivered by a parent to a child, it will be presumed to be an advancement or gift.

This evidently was not a transaction between a money lender, seeking a profitable investment of his money, and one anxious to borrow. There is satisfactory proof that *Stewart* was to be furnished with this money, not to be expended as he pleased, but because his father-in-law felt an abiding conviction that if he furnished this money, one object which he anxiously desired to accomplish, the society, perhaps the tender cares and attention of a favorite daughter, in his declining years, would be accomplished. Who can examine this testimony and say, that

this money could have been obtained by *Stewart*, even although he had promised to pay legal interest for it, provided it was not designed to assist him in purchasing the farm, which seemed to derive very much of its value from the circumstances that it was very near that of *Pattison*, and moreover, if purchased, was to be the future home of his own daughter? Who ever heard of a money lender so little disposed, nay, so unwilling to have his debt secured, or, indeed, evidence of his debt? To be sure it would appear, from some of the witnesses, that he supposed that it was yet in his power, if he chose, to make of this advance a loan, and was sometimes more disposed than at others, so to consider it; but althongh he could, with great ease, have obtained evidence of the loan, if he intended that it should be a loan, yet he never could prevail upon himself to ask, or consent to receive a bond, or other evidence of a debt, and never, until his death, is the money demanded as so much lent to the son-in-law. Such a claim, set up at so late a period, not by the party himself, but by those who had not his knowledge of the transaction, if sustained at all, must be sustained by stringent proof. Where is it? Or, what proof is there that the supposed borrower received the money as so much money *lent* to him?

It would be difficult, too, to infer, from the proof, that this was intended as an advancement, that this is to be regarded as money given to a child, with a view to a portion or settlement. This inquiry, however, would only be necessary if there had been an actual or total intestacy. But see the authorities collected in *4th Dessassure* 291, 3 *Ba. Abt.*, *title Executors and Administrators* (edition in 1813.) *Letter K.*, *p.* 77, and also *Deputy Commissary's Guide*, *p.* 117.

To several of his children the testator gave legacies, adding thereto the words, "and no more of my estate." Are those children to be excluded from a share of the fund now to be distributed? We think not. Any portion of his personal estate of which the testator himself does not dispose, is to be distributed according to law; and it is no where provided in the law, that personal estate of an intestate is to be distributed among

some of the children, to the exclusion of others. The law permits individuals, capable of making a will, every privilege in regard to the disposition of their property, which can reasonably be asked. It takes upon itself to dispose of no part of the testator's estate, save only so much thereof, as he himself leaves undisposed of; and how it will dispose of this part of his estate, it makes known to him in its statute of distributions. An individual, then, having property, may, at his death, leave the whole of it undisposed of, or he may dispose of a part of it, dying intestate as to the rest, or he may dispose of everything belonging to him by a residuary clause. His will, as far as it is properly expressed, is the law touching the disposition of his property. A man is to dispose of his property by saying expressly, or by necessary implication, to whom it shall go, not by declaring to whom it shall not go; by declaring who shall be the objects of his bounty, notwithstanding the statute of distributions. The testator gives to some of his children so much (adding,) "and no more;" and is not this the effect of every bequest? The legatees claim the thing bequeathed, but no more. It is impossible, it would seem, to exclude some of the children because of the words "no more," if the testator really did die intestate, in regard to the fund now for distribution. It is said that the testator's will is to be gratified. This is true, when it is consistent with the law. But the law will not sanction a disposition *in this mode*. The authorities last cited, forbid us to give to the words "no more" such an effect. But, according to one of the arguments which have been urged, this is no case of intestacy at all. The rest of the children will take this fund under the will; the words "no more," used in reference to some of the children, give, by *implication*, this undisposed of fund to the others. We do not think that this is a reasonable or safe construction of wills, in this respect, like this. In the first place, a bequest to the other children is a bequest *expressly* of so much, and *impliedly* of no more to them. In the next place, the law does not conclude, that because a man has determined to disinherit one child, he means that all the rest should be his residuary lega-

tees. This act of disinheriting a child, (leaving him or her, so far as it depends upon his or her father, utterly destitute,) is one which the law cannot regard very favorably. If the will be so explicit that it must be so, let it be so; but if it must be done, it must, because the testator has expressly declared it; not because he may, as well as may not, have intended it. It may be that he used those words in the expectation that a child's share of the undisposed residue would be, in his opinion, a sufficient provision for that child, and simply for that reason, gave to such child no more by will. If such was the necessary effect of annexing the words "no more" to a devise or bequest, then all the children might be disinherited, *unless* there chanced to be one of them who was unnoticed altogether in the will. These words may be rejected as surplussage, a process not usual in construing wills. They evidence an intent, but a mere intention will not defeat these children. *2nd Story's Equity, sect.* 1065, *(a) 4th edition.*

The order of the orphans court excludes *Jeremiah L. Pattison* from any share of the fund to be distributed, and this, because, in the opinion of the court, a conveyance of a tract of land to him, by the deceased, was an advancement to him, and greater in value than a share. In this there is error. The fund in the hands of the executors, and to be distributed by the court, consists entirely of personal estate. With the real estate of the deceased, when and how the deceased has disposed of that estate to his children, the orphans court has no concern. As one of the children of the deceased, he claims a child's portion of the personal estate, and even if there had been a total intestacy, it is by no law made the duty of the orphans court to ascertain what portion of the real estate he received. In a different form, and in a different *forum*, controversies in regard to the real estate, must be settled.

This court is of opinion that *Ann Elizabeth* and *Margaret W. Pattison* are not entitled, either of them, to the sum of fifteen hundred dollars, to be paid out of the personal assets now to be distributed. If payable at all, it must be claimed of the devisee, who, by the will, is required to pay it. Accord

ing to the opinion we have just expressed, the supposed deed to *Jeremiah L. Pattison* is not properly before us, and it is not for us to decide whether he claims the land under the will, or under a valid conveyance, which secured the estate to him before the will took effect. If the the latter, we need not remark that the deceased could not, by his will, charge this land with the payment of $3,000, and certainly he has not made his personal estate answerable for it.

In the appeal by *Stewart* and wife, the order of the court is reversed, and also that portion of it from which *Jeremiah L. Pattison* appeals. In the appeal by *Stewart* and wife, *Birkley* and wife, and others, order affirmed; and in the appeal by *Fooks* and wife, and *Miss Pattison*, the order is affirmed. The costs in both courts to be paid out of the assets of the estate.

ORDER REVERSED IN PART, AND
AFFIRMED IN PART.

WM. D. MERRICK, *vs.* THE TRUSTEES OF THE BANK OF THE METROPOLIS.—*June*, 1849.

The stockholders of a bank, whose charter was about to expire, met and resolved to assign its assets to trustees, for the purpose of private banking, and instructed the president and directors to prepare and execute deeds to effect this object, and the *cashier* to endorse and transfer all the notes, &c., of the bank to such trustees. The president and directors accordingly conveyed the assets to the cashier, in trust, to convey them to themselves, as trustees, to be held for the uses expressed in the resolutions of the stockholders, which was done. On the same day, being that preceding the expiration of the charter, the directors of the bank met, and, among other things, directed that the agreement of the bank, to endorse all notes, &c., payable to the bank, which was done in the progress of and with the assent of the cashier. They then adjourned sine die, and the corporation was dissolved. Held:

That, by these proceedings, the directions of the stockholders were, in substance, complied with, and the assets properly transferred to the trustees,

who were, therefore, entitled to sue upon the notes due the bank, and thus endorsed by the president, and transferred to them.

A declaration set forth a note as payable to "*The Bank of the Metropolis.*" HELD: that this being enough to show that there is such a body politic, and to distinguish it from others, the corporation is well named.

The endorsee of a note may give it in evidence under the money counts.

The president and directors having, by the charter, full power to conduct the affairs of the bank, had the right to authorise the president to indorse its notes.

That the assent of a majority of the stockholders is the assent of all, is an implied stipulation in every compact of this sort.

The president and directors of a bank have the right to assign for the payment of debts, without the assent of any single stockholder.

The authority to endorse, conveys *per se*, the authority to *deliver;* the allegation of indorsement includes delivery, and when the former is proved, it is unnecessary to prove or aver the latter.

A contract that is illegal in itself, or that contemplates the violation of some statute, or is against public morals, cannot invoke the aid of a court of justice.

The provisions of the act of Congress, of 1817, against private banking in the *District of Columbia*, expired in 1836, together with the charters of the banks thereby incorporated.

Unless *mala fides* be proved or alleged, the court will not inquire into the *consideration* of an endorsement.

Though the evidence may show the contract to be joint and several, yet the court must look to the pleadings alone, and are confined to what they allege. It is only on the case made in the pleadings, that the plaintiff can recover.

When the contract is joint and several, the plaintiff must treat it as wholly joint, or wholly separate, and must sue all the parties together, or each by himself.

If one of several joint contractors be sued alone, he can only take advantage of it by plea in abatement. It is not matter in bar, or in arrest of judgment, or of variance in evidence on the trial.

But, if the declaration discloses that the promise is joint, it is necessary to aver that the other co-promissor is dead, or to account for his not being joined in the action, or it is bad upon demurrer, or writ of error.

The plaintiff is entitled to every intendment of law in support of the verdict. Everything that the defendant could object, will be presumed to have been made at the trial, and overruled.

Cured by verdict, means that the court will, after verdict, presume or intend that the particular thing required to sustain it, was proved at the trial. It may, therefore, be intended, in this case, that the death of the other co-promissor was proved to the jury.

The fact that two make a note, is a sufficient consideration for the promise of *one* to pay.

When the promise is laid in the declaration on motion in arrest, it will be presumed that an express promise, if requisite, has been proved. The plaintiff, in such case, is not required to stand upon his proof, but invokes to his aid the intendment of the law.

The existence of a legal liability by the defendant, is a sufficient basis for an express promise to be intended after verdict, and the promise of one, on the antecedent liability of both, is also sufficient.

If the declaration alleges that two jointly made a note, and jointly promised to pay, after verdict against one sued separately, it will be presumed that they jointly and severally promised. Both may have promised separately in the note, and the one separately afterwards.

Appeal from *Charles* county court.

This was an action of assumpsit, instituted by *John P. Vanness*, *John Boyle*, and others, the appellees, trustees of the *Bank of the Metropolis*, against the appellant, upon the promissory note recited in the opinion of this court.

The declaration contains four counts. The 1st avers, "that whereas the said defendant and a certain *James W. McCulloh*, heretofore, to wit: on the 30th of October, 1843, at," &c., "made their certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, four months after the date thereof, to the *Bank of the Metropolis*, or order, $1,200, and then and there delivered the said note," &c., "and the said *Bank of the Metropolis*, to whom," &c., "by *John P. Vanness*, the president of said bank, who was authorised by the charter and by-laws of said bank, and was accustomed to make such endorsements, endorsed the said note; by which said endorsement the said *Bank of the Metropolis* then and there ordered and appointed the said sum of money," &c., "to be paid to the plaintiffs, by means whereof, and by force of the statute," &c., "the defendant became liable," &c., "and being so liable, the said defendant undertook and promised to pay the plaintiffs said note."

2nd Count. "Whereas the said defendant and *McCulloh* made," &c., (reciting the place and date of the note, as in 1st count,) "and thereby jointly and severally promised to pay,"

&c., (stating amount and delivery of the note,) "and the said bank to whom the said note was to be paid." "On the 3rd of July, 1844, at," &c., "by their certain deed of trust and assignment in writing, *bona fide* assigned all and singular the bonds, bills, notes," &c., "due and belonging to said bank, to a certain *Richard Smith*, and then and there delivered the same to said *Smith*." And the plaintiffs aver "that this note was one of the notes so assigned and delivered to *Smith*." "And the said *Smith*, to whom the said promissory note was so assigned, *bona fide*, by his deed of trust and assignment in writing, on the day," &c., "at," &c., "assigned the said note to the plaintiffs, and then and there delivered the same, so assigned to them." "By reason whereof, and by force of the statute," &c., (*stating liability* and promise, as in 1st count.)

The *3rd Count*, simply charges, that the defendants was indebted to the plaintiffs in the sum of $1,200, for money lent and advanced, and paid, laid out and expended, and for money had and received.

The *4th Count*, states, that whereas the defendant and said *McCulloh* were indebted, jointly and severally, to the *Bank of the Metropolis*, in the sum of $1,200, payable four months after date, to said bank, or its order, for money by said bank lent and advanced to, paid, laid out and expended for them, and for money by them had and received; and being so indebted, they severally undertook and promised to pay said bank the said sum of money. And the said bank, by *John P. Vanness*, its president, who was authorised by the charter and by-laws of said bank, and was accustomed to transfer, by endorsement, such debts and promises, &c., did, by endorsement, transfer said debts and promises to the plaintiffs, by means whereof, and by force of the statute, &c., the defendant become liable, and promised to pay said sums to the plaintiffs.

The defendant pleaded *non assumpsit*.

1st Exception. The plaintiffs, to support the issues on their part, offered the note referred to in evidence, subject to all legal exceptions, and proved the signatures of the makers and

of the endorser. They then offered the evidence which is sufficiently stated in the opinion of this court. Upon this evidence the defendant offered the following prayers:

1st. That the promissory note, signed by defendant and *James W. McCulloh* is not competent evidence for the consideration of the jury.

2nd. That the plaintiffs cannot recover, because there is no evidence of the transfer of said note to them.

3rd. That they cannot recover, because the endorsement of said note by *John P. Vanness*, as president, is not proved to to have been authorised by the *Bank of the Metropolis*, the payee.

4th. That they are not entitled to recover, because there is no evidence of the authority of said *Vanness* to deliver said note to them.

5th. That if the jury find, from the evidence, that said note was delivered by said *Vanness* to the plaintiffs, for the purpose of passing the same from the possession of the *Bank of the Metropolis*, then they cannot recover, if the jury shall further find that the plaintiff, or some of them, received the same with full knowledge of the proceedings and resolutions of the stockholders of said bank, and the orders and proceedings of the president and directors of said bank read in evidence.

6th. That if the jury find, from the evidence, that there was no authority conferred by said bank upon said *Vanness*, to deliver said note to the plaintiffs, then they cannot recover, if the jury further find that they received said note from said *Vanness*, and at the time of receiving the same, they, or some of them, were aware of such want of authority.

7th. That if the jury find, from the evidence, that said note was not passed to the plaintiffs for a valuable consideration, then they cannot recover, unless the jury further find that the same was delivered by *Richard Smith* to the plaintiffs.

8th. That by the proceedings and resolutions of the stockholders, and the proceedings and orders of the directors, as recited in the deed read in evidence, there was no authority to said *Vanness* to deliver the note in suit to the plaintiffs

9th That if the jury find, from the evidence, that said note was endorsed and delivered to plaintiffs, for the purposes and uses set forth in the resolutions of the stockholders of the *Bank of the Metropolis*, as read in evidence, then such endorsement and delivery were null and void, according to the true intent and meaning of the acts of Congress, read in evidence to the jury; provided the jury further find, that the design of such endorsement and delivery was to enable the plaintiffs, as individuals, with the proceeds of said note and other assets of said bank, to carry on, in the *District of Columbia*, the business of private banking.

But the court (MAGRUDER, C. J.,) refused to grant said prayers, or any of them, and the defendant excepted.

2ND EXCEPTION. The defendant further prayed the court to instruct the jury, that upon the evidence in the cause, if believed by them, the plaintiffs were not entitled to recover upon the 2nd, 3rd, and 4th counts of the declaration, which prayer the court granted, and so instructed the jury. To which instruction the plaintiffs excepted.

The verdict was for the plaintiffs on the first count, whereupon the defendant moved in arrest of judgment, because said count was wholly insufficient and defective. But the court overruled the motion, and rendered judgment for the plaintiffs, and defendant appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, MARTIN and FRICK, J.

By R. T. MERRICK and BRENT, for the appellant, and
By WM. SCHLEY and F. F. BROWN, for the appellees.

FRICK, J., delivered the opinion of this court.

The claim of the plaintiffs (the present appellees,) has its origin in a note discounted at the *Bank of the Metropolis*, in the *District of Columbia*, of the following tenor:

"$1,200. *Washington*, 30th October, 1843.

Four months after date, we jointly and severally promise to

pay to the *Bank of the Metropolis*, or order, twelve hundred dollars, for value received. JAMES W. MCCULLOH,
WM. D. MERRICK."

On the back of the note is the following endorsement:

"Pay to *John P. Vanness*, *John Boyle*, *Thomas Carbery*, *Nathaniel P. Causin*, *George W. Graham*, *Charles Hill*, *Lewis Johnson*, *John W. Maury*, *George Parker*, and *James Thompson*, trustees of the *Bank of the Metropolis*, or their order. JOHN P. VANNESS, Pres't."

At maturity the said note was not paid, and remained a part of the assets of the Bank on the 3rd of July, 1844, when the charter was about to expire. In anticipation of this event, the stockholders had assembled to deliberate upon the further disposition of the assets of the bank, and the requisite representation in number and amount of shares, and more than a majority of the shares of stock, being present, to provide for the existing state of affairs, they resolved: "That the entire property and assets of the bank should be assigned and conveyed over to trustees;" and after providing for the payment of the debts, deposits and circulation of the bank, further resolved, "that the president and directors be instructed to cause to be prepared and executed such deeds as may be best adapted, in their judgment, to secure the objects of their meeting; and after providing for the fulfilment of all the obligations of the bank, to manage and conduct the affairs and property in their hands, as will most nearly correspond with the present and past business of the institution." And further, "that when the trustees shall be appointed as aforesaid, the *cashier* be, and he is directed and empowered to assign, transfer and endorse to them all notes, bills, and other evidences of debt, and all other personal property, &c., belonging to the bank, which may require to be thus transferred."

It having been determined that the president and directors of the bank should be constituted the future trustees, it was deemed advisable thus, in the first instance, to convey to an intermediate agent, and *Richard Smith*, the cashier of the bank, was selected [illegible] whom the president and directors were

required to execute the deed of assignment; and *Smith* was, thereupon, to re-convey to the individuals who constituted the then president and directors of the institution, as trustees, and by them the business of the institution was to be thenceforth conducted, under the designation of "Trustees of the *Bank of the Metropolis*." In pursuance of these resolutions of the stockholders, the deed of assignment reciting all these proceedings, was executed to *Smith*, of all the estate of the bank, bills, bonds, notes, &c., in trust, that he should assign and transfer the estate, and all the property, right, claim and demand conveyed to him by the deed, to the present plaintiffs, as the trustees selected by the stockholders, for the uses and purposes expressed in the resolutions adopted by them at their general meeting. And in conformity with this arrangement, *Richard Smith*, on the same day, (the 3rd of July, 1844,) reconveyed and assigned to these trustees all the property and estate so conveyed to him, to be held by them for the uses and purposes expressed in the resolutions of the stockholders, and the deed of trust executed to him by their directions.

On the same day the board of directors of the bank met, and it was then ordered, "that all the stocks standing in the name of the bank, or of *Richard Smith*, cashier, hypothecated to the bank, should be transferred to *Richard Smith;* that the funds of the bank, when counted and delivered up by the cashier to the trustees, should again be placed in the hands of *Richard Smith*, as cashier of the new concern; and further, that all notes payable to the president and directors of the bank, be endorsed by *General Vanness*, as president of the bank, and the seal of the bank affixed, when necessary."

This note, among others, was so endorsed by *John P. Vanness*, president. And it was proved, by *John D. James*, a competent witness, that the president was, at that time, accustomed to make such endorsements when required, or during the absence of the cashier; while *Smith*, in his testimony, says it was not customary for the president to endorse notes held by the bank, unless, from the absence of the cashier, it became necessary; but, that at the time alluded to, he endorsed

all the notes held by the bank, which were made payable to the bank.

The plaintiffs further proved, that the amount specified in the note was loaned to the said *McCulloh* upon the security of said note, and also proved the handwriting of both to the note, that defendant admitted his liability, and promised to make *McCulloh* pay it.

Upon these facts, nine prayers were submitted by defendant for the instruction of the court, all of which were rejected, and it becomes our duty now briefly to examine them.

The first in order proposed was, that the promissory note, signed by *McCulloh* and the defendant, is not competent evidence for the consideration of the jury. The prayer does not advise the court of the precise objection to the note which is relied on. In one view it may be predicated upon the proposition so much relied upon throughout the case, that there was no authority in the president of the bank to endorse the note, and, consequently, no title passed by it to the plaintiff, and that, in this point of view, it was not admissible to go to the jury. As this same objection runs through the whole of the subsequent prayers, presented in a variety of aspects, and more distinctly announced, we shall defer the examination of it until we come to discuss them hereafter. In support of the prayer, it has been urged, that the declaration sets forth the note as made to the "*Bank of the Metropolis*," and that there is no evidence of the existence of such a bank. The 24th section of the act of Congress of 1817, ch. 93, it is said, enacts that "all those persons who have heretofore subscribed certain articles of limited partnership, under the name and style of 'the president and directors of the *Bank of the Metropolis*,' be and are hereby incorporated." The act does not say incorporated by that name. On the contrary, the same section continues: "The said '*Bank of the Metropolis*,' *and* the president and directors, shall be subject to the like rules and regulations," &c.; dropping the style of the president and directors, and simply designating its true corporate name to be the "*Bank of the Metropolis*." The act of Congress has thus given sanction to the name

under which this note was framed, and there was no necessity (as contended for,) to supply any deficiency by suitable averments in the declaration. But were it otherwise, the case of the *Hagerstown Road Company vs. Creager*, 5 *H. & J.*, 124, rejects this strictness in pleading, and decides, that if there is enough said in the contract to show that there is such a body politic, and to distinguish it from others, the corporation is well named. Besides, this objection is further obviated by the 3rd count, where the parties are introduced as "the president and directors of the bank," &c. The prayer admits the making of the note, and even on the 1st count, excluding all the others, it was pertinent to the issue, and, therefore, admissible. The allegation is, that the two parties had made their promissory note to the bank, and the very note, so made, is offered in evidence. On the 2nd and 3rd counts, which proceeds on the basis of the assignment by the bank to the plaintiffs, it is clearly admissible. On the authority of *Penn vs. Flack*, 3 *G. & J.*, 369, the endorsee of a note may give it in evidence on the money counts, and apart from other considerations, it is clearly a case in which the plaintiff might recover on these counts.

The 2nd and 3rd prayers assert the proposition that there is no evidence of the transfer of this note to the plaintiffs, and that they cannot recover, because the endorsement by *Vanness*, as president, is not proved to have been authorised by the bank. Not that there was no transfer in point of fact, but that there was no right to transfer by the president. It is maintained that the president *ex officio* had no power to endorse the notes of the bank. This may, or may not be so, according to the particular state of facts presented. Ordinarily the cashier, as the agent and servant of the president and directors, has this power conferred on him. But, in the present instance, the board of directors *instructed* the president to endorse all the notes, and this note, among others, was so endorsed by him. So far the act was fully authorised; the president and directors, by the 4th and 6th sections of the act, having full power to conduct the affairs of the bank, and to make all such rules, regulations and orders for the government of the bank, from time to time, as

they may deem expedient. The power which the cashier has to endorse the notes, is derived from the same source, and that power, for any specific purpose, may at any time be revoked by the board, and conferred upon another, as was the case in this instance.

But it is asserted, that with a view to the expiration of the charter of the bank, and with intent to pass the property of the bank to these plaintiffs, the stockholders, at a previous meeting, had empowered and instructed the cashier to endorse these notes, and that, consequently, the order of the board of directors was in conflict with this power conferred on *Smith*. In other words, that the resolution of the stockholders was paramount, and obligatory on the president and directors of the bank.

Let us briefly examine the condition of affairs when these proceedings were had, and no difficulty exists in reconciling this apparent conflict of authority. The charter was about to expire on the 4th of July. Congress had adjourned without providing for any extension. The stockholders were, therefore, convened, and engaged in measures to liquidate the concerns of the corporation, and devote the property and capital of the bank, thereafter, to private banking, under the administration of trustees, without violating or conflicting with the presumed object of Congress, in declining an extension of their charter. The president and directors were selected as the trustees. They could not execute an assignment to themselves, and *Richard Smith*, the cashier, was selected as the agent and conduit, through whom the property and effects of the old were to pass to the trustees of the new institution. That the majority there assembled had a right so to direct and dispose of the concern, is not to be questioned. *Angel and Ames on Corporations*, 459. That the assent of a majority is the assent of all, is an implied stipulation in every compact of this sort. See, also, *Union Bank of Tennessee, vs. Ellicott and others*, 6 *G. & J.*, 363. Where the right is recognised of the president and directors to assign for the payment of debts; without the assent even

any single stockholder. See, further, 17*th section of the charter, act of Congress*, 1817.

By the 5th resolution of these stockholders, the cashier was directed and empowered to assign, transfer and endorse all bills, notes and other evidences of debt. The deeds of transfer of all the property and effects of the bank, were to be prepared and executed by the president and directors. On the 3rd of July, these deeds were submitted and executed, and the order passed by the board of directors, that the president should endorse all the notes, which was done in the presence of *Smith*, the cashier, with his consent and concurrence, of course, and the note here in question, with all the others so endorsed, passed into the hands of the trustees, the present plaintiffs. The board of directors then adjourned *sine die*, and the corporation was dissolved.

Were not all things here complied with, which the stockholders contemplated? All these prescribed forms, by transfer, endorsement and delivery of the effects of the corporation, were designed to concenter in one body, in whom the future title was to vest. How could it be material through what form it reached them? The mode designated by the stockholders, was but a form adopted by them, but by no means obligatory on the directors, in whom the authority to administer the affairs of the bank, still remained on the 3rd of July. They fully complied with the substance by executing the purpose of the stockholders, although through another agent. And if the object of the trust, and its purposes, were attained, if its conditions were satisfied fully, in the absence of *mala fides* on the part of the directors, the objection seems, to this court, one of form alone, and not material.

These prayers assume, moreover, that the stockholders had a right to control the legitimate functions of the board of directors, and to annul the powers granted to them by the charter. In one sense, they are the agents of the stockholders, but with all the power conferred on them by the charter, during the period for which they are elected. The rights of both principal and agent exist in virtue of the same law. The powers of

each are defined by the law; and that the directors had authority themselves to direct the form of this transfer, is evident from the gift of power conferred by the 6th section of the charter. See, also, *Angel and Ames*, 293, 294. But we cannot construe the resolution of the stockholders, even if paramount, to be mandatory on the directors, and the object of both principal and agent to give vitality to a new institution being attained, we think that thus far the objection to the means and the medium of its accomplishment is not sustained.

This view disposes not only of the 2nd and 3rd prayers, but also of the 4th and 8th. The authority to endorse, conveys *per se* the authority *to deliver*, and by showing the authority to endorse, disputed by the 2nd and 3rd, we also establish the delivery denied in the 4th and 8th. The allegation of the endorsement includes delivery. *Chitty on Bills*, 251, 252. An endorsement with intent to pass, even though the bill be left with the endorser, imports a transfer. And where the endorsement is proved, it is unnecessary to prove or aver delivery. 1 *Gill*, 45, *Buckmeyer and Whiteford*, where the holder brings suit, and may recover, unless *mala fides* be proved. 7 *Term R.*, 596. 5 *East.*, 476. *Chitty on Bills*, 322.

But we are told, that this whole transaction being in contravention of law, and its purpose unauthorised and illegal, all the proceedings of these parties under it are void, and the endorsement and transfer can have no legal validity. That the stipulated purpose of this trust was to enable the parties, with the proceeds of this note, and the other assets of the bank, to carry on *private banking* in the *District of Columbia*, contrary to the provisions in the same act of Congress by which the charter is conferred, and this objection is the basis of the 5th and 9th prayers.

The 29th section of the act is to this purport: "That after the 4th of April ensuing, it shall not be lawful for any unchartered banking company, or any association, partnership or company of individuals within the *District*, to discount any notes for the payment of money, or to issue bills, &c., and the violation of the law shall be held to be a misdemeanor," &c. And

the 30th and 31st sections inflict the penalty upon the officer or agent of any such associations who sign the bills and notes, and declares the bills so discounted null and void.

It is not to be denied that this provision presents, at first view, a formidable objection to the whole *res gesta* under consideration. A contract illegal in itself, or that contemplates the violation of some statute, or is against public morals, cannot invoke the aid of a court of justice; for the court will not contribute the means of infringing the law. The *mala fides* of the transaction is thus let in, and the authority to transfer and endorse, if the alleged purpose is in violation of law, may justly be questioned. But this objection is here relieved by the fact that the prohibition is no longer in existence. Together with the banks incorporated by the act, the provision expired. The act of Congress, of 1817, under which the *Bank of the Metropolis* holds its charter, and which contains this prohibition, was to continue until the 1st of January, 1822. By a further act of the 2nd of March, 1821, it is provided that the acts incorporating the several banks of the *District of Columbia* (i. e., the acts of 1817,) be and the same are hereby *extended* and *limited* to the 3rd day of March, 1836. It has been strenuously urged that these provisions against private banking, did not fall with the other provisions of the act. But it must be intended here, that the act of 1821, which *extends* the whole, and keeps it in force until 1836, must be designed to *limit* the whole to that period, unless something to the contrary is expressed or appears. It might readily be shown that the acts which called into existence these corporations, were intended to place restrictions upon the private banking practised to excess and ruin at that period, and was further intended to protect the operations of these chartered banks. And it might also be safely assumed, that when Congress suffered these corporations afterwards to expire by their own limitation, they did not design that the *District of Columbia* should be excluded and prohibited from all banking operations, private or corporate. But whether this be so or not, as we conceive and construe these acts, the prohibitions they contain must be considered parts of the acts, and

both fall together. At the same time it is conceded there is no other action of Congress on the subject; at least none has been referred to as reaching these plaintiffs. And in this view, the 5th and 9th prayers were properly rejected, and may be said to dispose of the whole case made upon the prayers. It establishes the legality of the endorsement, and the purpose for which it was made. For that purpose, the endorsement of the president was as efficacious as the cashier's, the whole proceeding having the express sanction of *Smith*, by his presence and co-operation.

We have already shown that the right to endorse imports the right to deliver. The actual delivery of the note, and its possession by the present plaintiffs, is conceded. The 6th prayer proceeds upon the ground, that nothing passed by the delivery, if there was no authority to endorse, *and the plaintiffs were aware of it.* From what has been said, it follows that this prayer was also properly rejected.

The 7th, and only remaining prayer to be disposed of, impeaches the consideration of this endorsement, which we have shown was legally made, and upon sufficient authority. It resolves itself properly in the 5th and 9th. Unless *mala fides* be proved or alleged, the court will not enquire into the *consideration* of the endorsement. 1 *Gill*, 45. The *mala fides* has not been proved; and that alleged has been sufficiently answered. The transfer was made to the plaintiffs, with other funds of the bank, to liquidate the debts and affairs of the corporation, and the whole character of the trust to plaintiffs shows abundant consideration for the transfer.

We leave out of view that some of these prayers propose to submit to the jury this question of authority, which, upon the deeds and other written proceedings, was exclusively for the court, as upon other grounds we sustain the county court in rejecting the whole series of prayers offered on the part of the defendant.

2ND EXCEPTION. After the court below had refused to grant these prayers, the defendant further prayed the court to instruct the jury, that upon the evidence in the cause, if believed by

them, the plaintiffs were not entitled to recover on the 2nd, 3rd and 4th counts in the declaration, which prayer the court granted, and so instructed the jury. And the verdict having been rendered against the defendant on the 1st count, his counsel moved in arrest of judgment, because: the declaration discloses a *joint* promise on the part of the defendant and another, and, therefore, judgment ought not to be rendered against this defendant alone. But the court overruled the motion, and we are now to enquire, whether the 1st count is good and sufficient, more especially after verdict.

Does the declaration here disclose a *joint* contract? The averment is, that whereas the defendant and a certain *James W. McCulloh* made their certain promissory note in writing, and promised to pay, and that the *Bank of the Metropolis*, to whom it was made payable by its president, endorsed the same to the plaintiffs, by means whereof the *defendant* became liable, and promised to pay according to the tenor and effect of said note. *Dehors* the nar, and the pleadings the note here produced in evidence, is joint and several. But the court must look to the pleadings alone, and are confined to what they allege. It is only on the case made in the pleadings that the plaintiff can recover. "When the contract is joint and several, the plaintiff must treat it as wholly joint or wholly separate, and must sue all the parties together, or each by himself." 1 *Chitty's Pl.*, 43, 44. *Addison*, 880. "Each party on a *joint* contract may be severally liable in one sense, that is, if sued separately, and he does not plead in abatement, he may become liable for the whole debt." *Same*, 875. "Where the one has been thus seperately sued, advantage can only be had of it by plea in abatement." 3 *H. & J.*, 572, *Brown vs. Warram*. "It is not matter in bar or in arrest of judgment, upon the finding of the jury, or of variance in evidence on the trial." 10 *Peters*, 300, *Gilman vs. Rives*. 43 *L. Lib.*, 391, *Rice vs. State*. But if the declaration discloses (as is here contended,) that the promise is joint, it is necessary to aver that the other is dead, or to account for his not being

joined in the action, or it is bad upon demurrer or writ of error. 43 *L. Lib.*, *loco cit.* 5 *Greenleaf*, 443.

We must observe that the objection here is not upon demurrer, but upon motion in arrest of judgment, on the alleged insufficiency of the 1st count to support the action, and the plaintiffs are entitled to every intendment of law in support of the verdict. Everything that the defendant could object, will be presumed to have been made at the trial, and it must be intended that they have been there made and overruled. "Where the statement in the pleadings is imperfect and insufficient, but of such a character as to lead the court to believe that all must have been proved on the trial which should have been stated in the pleading, to have justified the jury in finding the verdict, the defective pleading is aided by intendment after the verdict." 2 *Gilman*, 307. It may, therefore, be intended that the proof was before the jury of the death of the other co-promissor, and the verdict then stands unimpeachable on that ground of objection.

If this proof was necessary to enable the plaintiffs to recover, and without which it is presumed that the verdict would not be given, it will be intended that it was done. "Cured by verdict means, that the court will, after verdict, presume or intend that the particular thing required to sustain it, was proved at the trial." *Chitty's Pl.*, 673. "After verdict, a defective allegation in the declaration cannot be taken advantage of, though it might furnish good cause of demurrer." *Vandersmith vs. Washmein*, 1 *H. & G.*, 4. "Whatever might have been relied on to defeat the action, must be intended to have been proved at trial after verdict." 7 *Smedes and Marsh*, 49. 8 *Sm. and Marsh*, 562. 2 *Gilman*, 307. Here it is averred that the defendant promised to pay according to the tenor and effect of the note; and it is further objected that there is no consideration here shown for the one to pay. Is not the fact that two made a note, a sufficient consideration for the promise of *one* to pay? Each is liable for the whole, at the selection of the plaintiff. If an express promise be necessary, the law will intend the promise. Even where the express promise is

necessary to support the action, the declaration never avers it to be an *express* promise, but only the mere promise to pay. And on motion in arrest, it will be intended that the express promise was proved. "When the promise is laid in the declaration, on motion in arrest, it will be presumed that an express promise (if requisite,) has been proved." 43 *Eng. C. L.*, 823. 2 *McLean*, 363. 61 *L. Lib.*, 310, *Biles on Bills. Cowp.* 132. The plaintiff, in such case, is not required to stand upon his proof, but invokes to his aid the intendment of law, that there was an express promise, and that it has been proved. The existence of a legal liability by the defendant, is a sufficient basis for an express promise to be intended after verdict; and the promise of one, upon the antecedent liability of both, is sufficient.

This is supposing the declaration to be defective, where the law will intend every thing necessary to support it, after verdict. But it does not appear upon the record, that *McCulloh* was *jointly* bound with the defendant, and it is questionable whether the declaration would be bad on demurrer. The allegation is, "that the two made a certain promissory note," not necessarily a *joint* note. And even if so, the verdict will intend that it was both joint and several. The objection is, that they jointly made the note, and jointly promised to pay. But after the verdict, we must presume that they jointly and severally promised. Both may have promised in the note, and the defendant may have promised separately afterwards; and thus the verdict and the pleadings are rendered consistent. At all events, the express promise is intended, and presumed, after verdict, to have been proved; and the court below were correct in their refusal to arrest the judgment.

JUDGMENT AFFIRMED.

George H. Smith *vs.* John Walton, use of Jesse Walton.—*June*, 1849.

A witness who has seen a party write, although but once, and who has in this mode acquired a knowledge of the general character of his handwriting, is competent to testify with respect to its genuineness.

A witness who has seen a party write, or who has corresponded with him, is qualified to speak with respect to the genuineness of his signature.

The impression made upon the mind of a witness who has seen a person write his name but once, may be exceedingly faint and imperfect, but it is, nevertheless, testimony, provided the witness can declare, that from his knowledge of the character of the handwriting thus acquired, he believes it to be genuine.

The question, so far as it relates to the competency of the witness, must depend not on the quantity of his information, but the source from which it is derived.

A witness said he believed the signature of the surname to be genuine, but could not say so as to the christian name, and, therefore, could not prove the whole signature. Held: that this evidence, standing by itself, would be admissible; but its admissibility is placed beyond controversy when offered in connection with the testimony of another witness, who proved, in his opinion, the whole signature genuine.

Where both, by the nature of the questions on cross-examination, and the character of the prayer offered to the court below, by the defendant, it was conceded that the witness had the knowledge capacitating him to testify in regard to the handwriting, his testimony is not open, in this court, to the objection that the plaintiff should have established such knowledge as a preliminary fact, before asking the witness to testify, from such knowledge, to the genuineness of the signature.

It is perfectly legitimate, for the purpose of refreshing his recollection of the handwriting, to hand to the witness a paper which he saw the defendant sign, and then for the witness to state, as the result of a comparison between that signature and the impression formed in his mind of the general character of the defendant's writing, derived from antecedent knowledge, that he believed the disputed signature genuine.

But the opinion of a witness who founds his belief upon a mere naked comparison of two signatures, one disputed, and the other known by him to be genuine, is clearly inadmissible to prove the genuineness of the disputed signature.

It is a rule of law, now too firmly established to be disturbed, that signatures cannot be proved by a direct comparison of hands; by which is meant the collation of two papers in juxta-position for the purpose of ascertaining, by inspection, if they were written by the same person.

Smith *vs.* Walton.—1849.

The sufficiency, in fact, of testimony to sustain the issue, is exclusively a question for the jury.

Appeal from *Saint Mary's* county court.

This was an action of debt instituted by the appellee, *John Walton*, against the appellant, on the 29th of June, 1847, upon a single bill in favor of said *Walton*, for $539.30, purporting to be signed and sealed by *George H. Smith*, the appellant. The defendant pleaded *non est factum*, upon which issue was joined.

In the course of the trial, four exceptions were taken by the defendant. The 1st is fully stated in the opinion of the court. In the 2nd, the defendant, upon the evidence detailed in the 1st, prayed the court to instruct the jury, that if they find, from the evidence, that *George W. Morgan* only saw the defendant write once, and that nearly five years ago, and that his recollection of the said writing was imperfect, and only revived by examination of the papers lately shown him, that though the evidence is admissible, it is a rule of law that such evidence is not of conclusive character, but belongs to that class of testimony which is regarded as faint, and an unsafe basis of action. Which instruction the court (Key and Crain, A. J.,) refused to give. Which refusal constitutes the 2nd exception.

3rd. In addition to the evidence in the foregoing bills of exception, the plaintiff offered to prove, by *James B. Kirk*, that from his knowledge of the general character of the handwriting of the defendant, he believes the word "*Smith*," signed to said single bill, to be genuine. Upon cross-examination, witness stated, that from the same knowledge of the general character of the handwriting of the defendant, he could not say that he believed the words, also there signed, "*Geo. H.*," to be genuine, and upon being asked, by defendant's counsel, whether he could say to the jury that, from his knowledge of the general character of the handwriting of said *George H. Smith*, he believed the signature to the single bill to be genuine, he answered, "he could not." Whereupon, the defendant prayed the court to reject the testimony, as legally insufficient to sup-

port the issues in this case; but the court overruled the objection, and permitted the same to go to the jury, to be weighed by them, to which action of the court the defendant excepted.

The 4th and last exception is fully stated in the opinion. The verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before Dorsey, C. J., Martin and Frick, J.

Pratt, for the appellant, said he would not trouble the court with the consideration of the question raised by the 1st exception, because it is more fully presented by the 4th exception; nor would he argue the question involved in the 2nd exception, as, in his judgment, the *legal sufficiency* of the proof to maintain the issue, is a question for the court, but the *sufficiency in fact* of such testimony, is exclusively a question for the jury. On the 3rd exception, he contended: 1st. That it was incumbent on the plaintiff to show the means by which his witness acquired a knowledge of the handwriting of the defendant, before he should have been permitted, from such alleged knowledge, to testify to the genuineness of the defendant's signature to the single bill in controversy. 2nd. That the testimony offered in this exception "was of so light and inconclusive a nature, as to be wholly insufficient to be made the basis of a verdict," and that the court below were the exclusive judges of the "measure and *quantity of proof legally sufficient* to prove the issue," and should, when called on by the defendant, have excluded this proof from the jury. Upon the 4th exception, he argued that the defendant having plead *non est factum*, it was incumbent on the plaintiff to prove the signing, sealing and delivery of the bond, and that it was incompetent for him to prove the signature of the defendant by placing in the hands of the witness a paper shown to be in the handwriting of the *defendant*, and then placing in his hands the single bill in dispute, and "asking the witness to *compare* the handwriting of each paper by placing them *side by side*.

and then to say whether, *from such comparison*, he believed the signature to the single bill to be in the handwriting of defendant."

McMahon, for the appellee, in reply to the 1st point under the 3rd exception, insisted that the objection, as made below, presents no such question; that it was waived, or the knowledge capacitating the witness to testify as to the handwriting, was impliedly conceded by the defendant's examination of the witness, and that he cannot, therefore, make the objection here; that it was shown by the subsequent proof stated in the 4th exception, that witness had seen defendant write, and if there were anything in the objection, it is no cause for reversal under such circumstances. In reply to the 2nd point under this exception, he maintained that the proof that the signature of the *surname* was genuine, did legally tend to prove the matter in issue, and was, therefore, properly admitted. That if it were the sole evidence in the case, it would have been admissible, and is clearly admissible when, as here, it is but part of the proof offered, and after evidence going to show the genuineness of the whole signature. Under the 4th exception, he contended, in reply to the appellant's point: that the draft which the witness saw the defendant sign, was properly exhibited to him for the purpose of refreshing his memory, and thereby enabling him, with the aid derived from the comparison, to express his belief as to the genuineness of the single bill in suit; that the evidence, after the comparison being given by a witness who had seen the defendant write, and had a knowledge of the general character of the defendant's handwriting, was not necessarily, as the evidence is stated, evidence of handwriting founded on the naked comparison alone, and exclusive of all knowledge of the witness; that being made by a witness having such knowledge, it is not a statement that the witness gained his knowledge of the writing solely from the comparison, and testified exclusively from that knowledge, and is consistent with the exercise of his previous general knowledge acting upon that comparison: and that the statement is

also consistent with the idea that the witness did not make the comparison to gain a knowledge of the handwriting by similarity of writing, and that the comparison being directed to other matters, such as a supposed difference in the manner of signing the christian name, which was removed by the exhibition of the draft signed in his presence, he was enabled thus to testify from his knowledge of the handwriting; that the witness, as one having a knowledge of the general character of the defendant's handwriting, and having before him the draft which *he saw* the defendant sign, could properly compare the two signatures, and was competent to testify, after such comparison, as to the similarity between the two signatures, and to express his belief founded on that similarity.

Martin, J., delivered the opinion of this court.

This was an action of debt instituted in *Saint Mary's* county court, by the appellee against the appellant, upon a single bill, to which the appellant pleaded *non est factum*.

It appears from the record, that at the trial of the issue joined upon this plea, the plaintiff offered to prove, by *George W. Morgan*, that in 1843, he had witnessed the signature of the defendant to a receipt which he had seen him sign; that the signature to that receipt very much resembled the signature to the cause of action, and that from that resemblance, and his knowledge of the character of the handwriting of the defendant, derived from that signature to said receipt, he believed the signature to the cause of action to be the signature of the defendant. Upon cross-examination, the witness further proved that he had never seen the defendant write his signature, except to that receipt; that he had no recollection of the character of the signature to that receipt, except from a subsequent examination of it in October, and that about one week after said examination of the receipt, he saw the single bill in dispute, and from his recollection of the signature to the receipt, he believed the signature to the single bill to be genuine; that he had also since compared the signatures to the receipts and single bill, by placing them side by side, and that he is still more

thoroughly convinced that the signature to the single bill is genuine. He further proved, that the said receipt has been in the possession of the plaintiff, and that he has never seen it, except in October, and at the present term of the court.

The introduction of this testimony, to prove the signature of the defendant to the cause of action in dispute, was resisted by his counsel. The objection was overruled, and the testimony permitted to go to the jury; and whether there was error in this opinion of the court below, is the question presented for our consideration by the *first* exception.

We think the decision of the court below, upon the point raised by this exception, was correct. It is true that the witness who was called to prove that the signature to the single bill was defendant's handwriting, had seen him write only on one occasion. But since the case of *Garrells vs. Alexander*, decided by *Lord Kenyon*, in 1801, 4 *Esp. Rep.*, 37, and recognised in the King's bench in 1836, in the case of *Doe vs. Suckermore*, 5 *Adolp. and Ellis*, 703, it has been regarded as an established rule of evidence, that a witness who has seen a party write, although but once, and has in this mode acquired a knowledge of the general character of his handwriting, is competent to testify with respect to its genuineness. The impression made upon the mind of a witness who has seen the defendant write his name only in a single instance, may be exceedingly faint and imperfect, but it is, nevertheless, testimony, provided the witness can declare, as he has done in the present case, that from his knowledge of the character of the defendant's handwriting, thus acquired, he believes it to be genuine. A witness who has seen a party write, or who has corresponded with him, is qualified to speak with respect to the genuineness of his signature. The question, so far as it relates to the competency of the witness, must depend, not upon the quantity of his information, but the source from whence it is derived. This evidence, like all evidence founded on probability, varies in every conceivable degree, from the highest to the lowest order of presumptive proof. It is, therefore, a proper subject for the consideration of a jury, who must determine

what influence and weight is to be given, under all the circumstances of the case, to the opinion of a witness who places his belief upon a single instance.

It was the observation of a learned judge, who delivered his opinion in the case of *Doe vs. Suckermore*, already adverted to, "that proof of handwriting, from the highest degree of certainty, carrying with it perfect assurance and conviction, to the lowest degree of probability, may be and is constantly submitted to the jury. From continued and habitual inspection or correspondence, or both, carried on till the trial itself, down to a single instance, or knowledge twenty years old, may be received." He alluded, he said, to the case of *Garrells vs. Alexander*, 4 *Esp. Rep.*, 37, where the execution of a bail bond was held by *Lord Kenyon*, to furnish means of knowledge. That the authority of that case was, indeed, questioned by *Lord Eldon*, upon another point, because the witness could not go so far as to express any belief, but as to the competency of a witness founding himself upon a single instance, we have the prevailing and important testimony of *Lord Eldon*, in *Eagleton vs. Kingston*, 8 *Ves.*, 473.

This rule of evidence was acknowledged by *Lord Ellenborough*, in *Powell vs. Ford*, 2 *Stark Cases*, 164. The witness in that case was rejected as incompetent, solely upon the ground that he had seen the party, whose signature was in dispute, write only his surname, but not his christian name. A distinction properly repudiated by *Chief Justice Abbott*, in *Lewis vs. Sapio*, 1 *Moody and Malkin*, 39. After proof that the surname was in the handwriting of the party, the jury might fairly conclude, if they believed it, that the whole signature was genuine. It would, indeed, be an extravagant presumption to infer that some counterfeit hand had written the christian name.

The court were correct, we think, in rejecting the prayer presented by the defendant in the *third* exception. We understand the witness, *J. B. Kirk*, introduced by the plaintiff, for the purpose of proving that the defendant's signature to the single bill was written by him, as stating that although from

his knowledge of the general character of the defendant's handwriting he believed the signature of the surname to be genuine, he could not say so as to the christian name, and could not, therefore, prove the whole signature; and assuming this to be the true construction of his testimony, it would be admissible, if standing alone, as conducing to establish the matter in contestation upon the authority of the case of *Lewis vs. Sapio*, decided at *Nisi Prius*, by *Chief Justice Abbott*, in 1827, 1 *Moody and M.*, 39, to which we have already referred. And its admissibility must be considered as placed beyond all controversy, when it is recollected that this proof was offered not as the sole evidence in the cause, but in connection with the testimony of *George W. Morgan*, who proved, that, in his opinion, the whole signature was genuine.

The counsel for the appellant has also contended, that this testimony was improperly received, because it was incumbent on the plaintiff to have established, as a preliminary fact, that his witness had acquired a knowledge of the handwriting of the defendant, by having seen him write, or in some other recognised and legitimate mode, before he was permitted to testify, from such knowledge, to the genuineness of the signature. But we think that the testimony is not now open to this objection. No such question was raised at the trial below, when the court was asked to reject the evidence "*as legally insufficient to support the issues in the cause.*" No attempt was made by the defendant, in his cross-examination of this witness, to explore the sources of his information, with respect to the handwriting in reference to which he was called upon to testify; and that the witness possessed that kind of knowledge which authorised him to speak of the genuineness of the defendant's signature, so far as his surname was concerned, is to be considered as a fact, conceded both by the nature of the questions propounded to him, on cross-examination, and by the character of the prayer addressed to the court, for their instruction to the jury. *Whittier vs. Gould*, 8 *Watts*, 485.

There was error, we think, in the ruling of the court upon the point of evidence raised for their decision in the *fourth* ex-

ception. It appears from this exception, that the plaintiff exhibited to *J. B. Kirk*, the witness before produced by him, for the purpose of refreshing his memory, a draft purporting to be drawn by the defendant, in favor of the witness, dated the 20th of March, 1841, and which the witness proved was signed by the defendant, in his presence. This course of examination was perfectly legitimate, and if the witness, after having thus re-touched and strengthened his recollection of the defendant's handwriting, by inspecting the draft, had stated that he believed the disputed signature to be genuine, as the result of a comparison between that signature and the impression he had formed in his mind as to the general character of the defendant's writing, derived from antecedent knowledge, no legal exception could have been taken to the testimony.

But this is not the character of the evidence resisted by the appellant, and received by the court. We are informed, by the bill of exception, that after the witness had inspected the draft, the counsel for the plaintiff handed to him the cause of action upon which the suit was instituted, and asked him to compare the two signatures, which the witness did; that the counsel then asked him whether, from comparing the two signatures, he did not believe the signature to the single bill to be genuine? To which the witness answered, *that from comparing the two signatures*, he believed the signature to the single bill to be genuine. And it is perfectly manifest, looking alone to the facts disclosed by this exception, that the opinion expressed by the witness, with respect to the genuineness of the signature to the cause of action, was not derived in any degree from his antecedent knowledge of the defendant's autograph, but was exclusively founded upon the supposed similarity between the single bill in contest, and the draft of the 20th of March, 1844; the two papers being placed, at that time, before him in juxta-position, that he might compare them in order to ascertain, from inspection, whether both were written by the same person. This we consider to be the true construction of the evidence contained in the fourth exception, and assuming this construction to be correct, the testimony was clearly inad-

missible as an attempt to prove the genuineness of the disputed signature, by the opinion of a witness who founded his belief upon a mere naked comparison of the two papers submitted for his examination. It appears from the evidence, as set forth in the exception, that the witness, in answer to a question proposed to him by the counsel of the plaintiff, stated, that from comparing the two signatures, he believed the signature to the single bill to be genuine; and although the witness had some previous acquaintance with the general character of the defendant's writing, yet as the belief he expressed with respect to the genuineness of the signature to the single bill, was not derived from that antecedent knowledge, but was founded upon a supposed similarity between the two signatures before him, he stood precisely in the predicament of a witness who, without ever having seen a party write, is required to testify to the authenticity of his signature by a mere comparison of hands. That evidence of this description is not admissible for the purpose of proving handwriting, is a rule of law now too firmly established to be disturbed. Much has been written and said to show that comparison of hands is, as a mode of proof, better calculated to elicit truth, than the belief of a witness, founded, as it necessarily is, upon a comparison of the controverted signature with some image or impression which he has received into his mind, from having observed a party write more or less frequently. Upon this ground, testimony of this character has been admitted as competent to establish handwriting by the adjudications of some of the *American* courts. This is in conflict with the doctrine of the common law, as enunciated in *Westminister* hall. We consider it as the settled rule of the *English* law, which in this respect we approve and adopt, that with the exception of ancient documents, an exception standing upon the necessity of the case, signatures cannot be proved by a direct comparison of hands. By which it is meant the collation of two papers in juxta-position, for the purpose of ascertaining, by inspection, if they were written by the same person.

In the case of *Doe vs. Suckermore*, it was remarked, by

Mr. Justice Coleridge: "That our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison, by a witness, of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. He said it was familiar to lawyers that many attempts have been made to introduce this mode of proof according to the practice of the civil and ecclesiastical laws, but that after some uncertainty of decision, the attempts have failed." The court were clearly right in rejecting the prayer offered by the defendant in the *second* exception, and that exception has been properly abandoned. We, therefore, affirm the opinions of the court below, as expressed in the first, second and third exceptions, and reverse the opinion expressed in the fourth exception.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

ANN EDELEN *vs.* BENNET GOUGH.—*June*, 1849.

Upon the true construction of the act of 1797, ch. 57, either party may challenge a juror for cause before he is sworn, whether he has or has not exercised his statutory right of striking four names peremptorily from the panel.

A witness who has seen the defendant write, though but once, is competent to speak with respect to the genuineness of his signature.

In an action upon a single bill which recited: "On a settlement this day of *H's* two notes due *B*, (amounting to, &c.,) I fall in his debt $406.46, which sum I hereby promise and oblige myself, my heirs, &c., to pay to *B*, or order, for value received," to which *non est factum* was pleaded, the defendant cannot give in evidence that *H* died some twenty years since, and was not related to the defendant in blood or estate, though connected with the opinion of a witness, familiar with the handwriting of the defendant, that the signature to the single bill was not genuine. Such evidence is irrelevant to the issue, and would tend to mislead the jury.

Appeal from *Saint Mary's* county court.

This was an action of debt brought by the appellee against the appellant, on the 19th of February, 1845, upon her single bill for $106.46 The plea was *non est factum*, upon which issue was joined. Upon the first trial of this case, there was an appeal taken by the defendant, which is reported in 5 *Gill*, 103. This court, upon that appeal, reversed the judgment of the court below, and awarded a *procedendo*. At the trial under this writ, there was the same plea and issue; but before any juror was sworn, the defendant moved the court, as preliminary to such swearing, that the several jurors should be asked whether they had formed and expressed an opinion upon the merits of this case. Which the court (KEY, A. J.,) refused to do, the defendant having struck four jurors from the full panel, directed in such cases. To this refusal the defendant excepted.

2ND EXCEPTION. In the further trial, the plaintiff offered to prove, by *William J. Edelen*, a competent witness, that he had seen the defendant write, and that from his knowledge of her handwriting, he believed the signature to the cause of action to be genuine. Upon cross-examination, witness stated that he had seen the defendant write her name to a receipt on a bond in February, 1846, (which bond he produced;) that although two other receipts had been entered on the bond, he had no distinct recollection of seeing the defendant sign her name to either. That the body of the receipts is not in his handwriting, nor does he know by whom they were written. That he has an impression that he has seen the defendant write at other times than February, 1846; but cannot distinctly state that he ever did see her write, except upon the occasion of signing the aforesaid receipt. That his belief of the genuineness of the disputed signature is derived from this impression of having seen her write previous to 1846, and from the resemblance between the signature to the receipt given by her, before spoken of, in 1846, and the disputed one, and from his knowledge and recollection of her handwriting, from having seen her sign her name to said receipt, on which occasion he

very particularly noticed her handwriting. To which testimony, on the whole, for the purpose of proving the genuineness of the signature to the cause of action, the defendant objected; but the court overruled the objection, and permitted the evidence to go the jury, to be weighed by them. To this decision the defendant excepted.

3rd Exception. The defendant then offered to prove, by *Benedict Gough*, a competent witness, that he is familiar with the handwriting of the defendant; has seen her write before, and, perhaps, more frequently than any one in the county; has been familiar with her handwriting for six or seven years, and, from his knowledge of her handwriting, he does not believe the signature in dispute to be genuine. The defendant then further offered to prove, by the same witness, that *Henry A. Edelen*, whose name is mentioned in said single bill, as the party drawing and owing the two notes stated therein, died some twenty years since, and that he was not connected with the said defendant in blood or estate, as a circumstance to go to the jury with the testimony already given, under the issue of *non est factum;* but the court refused to permit any of the testimony offered in relation to *Henry A. Edelen* to go to the jury. The defendant excepted, and the verdict and judgment being against her, appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Martin and Frick, J.

By Pratt, for the appellant, and
By Thos. S. Alexander, for the appellee.

Martin, J., delivered the opinion of this court.

It appears from the record in this case, that at the trial of the cause below, the defendant, before any juror had been sworn, and after he had stricken four names from the panel delivered to him, moved the court that the several jurors, before they were sworn to try the issue, should be asked whether they had formed and expressed an opinion as to the merits of the case;

and the court overruled the motion, upon the ground that the defendant had previously stricken four names from the panel.

We think the court erred in overruling the motion of the defendant. No objection was interposed by the plaintiff, and the prayer of the defendant was preferred to the court, upon the supposition that the plaintiff either had or would exercise his statutory privilege of striking peremptorily four names from the panel which had been delivered to him. The object of the defendant was to exclude from the list of jurors, after each party had stricken four names, those who had formed and expressed an opinion with respect to the merits of the case. This was his undoubted privilege, upon the true construction of the act of Assembly of 1797, ch. 57, as expounded by the Court of Appeals, in the case of *Lee* against *Peter*, 6 *Gill & John.*, 447. If one or more of the jurors remaining on the panel, after each party had exercised his statutory right of striking four names from the list of twenty, had been rejected as incompetent, their places should have been supplied by further draughts from the ballot-box, or, if necessary, by a *tales*. For example, if six jurors had been sworn to try the cause, and six rejected for favor, or any other legitimate reason, ten more jurors would have been drawn, and so in proportion, until an impartial jury was obtained. We desire it to be understood as our opinion, that either party may challenge a juror, for cause, before he is sworn, whether he has or has not exercised his statutory right of striking four names peremptorily from the panel.

It appears from the facts exhibited in the *second* exception, that the plaintiff, to support the issue joined by him on the plea of *non est factum*, proved by a witness, that he had seen the defendant write her name on one occasion in 1846, and that from his knowledge of her handwriting, he believed the signature to the cause of action offered in evidence to be genuine. The testimony was objected to by the counsel for the appellant, as inadmissible to prove that the signature in controversy was in the defendant's handwriting. The evidence was properly received by the court. The witness who had seen the defen-

dant write, although but once, was competent to speak with respect to the genuineness of the disputed signature, as the opinion which he formed and communicated to the jury was formed, as he states in his testimony, upon knowledge of the general character of her handwriting thus acquired. A similar question has been decided by this court at its present term, in the case of *Smith vs. Walton, ante p.* 77.

The court below were correct, we think, in rejecting the testimony offered by the defendant in relation to *Henry A. Edelen*, as detailed in the third bill of exceptions. We find from the record, that when this case was first tried in the court below, the defendant offered to read in evidence to the jury the administration accounts of *Henry A. Edelen*, showing a settlement and overpayment of the debts before the date of the writing obligatory, upon which the suit was instituted, and that he was not related to the defendant in blood, or connected with her in estate, as a circumstance to be weighed by the jury, upon the issues in the case. This evidence was rejected by the county court, as illegal and incompetent. The decision was affirmed by the Court of Appeals on the former appeal, and when considering the question of its admissibility, they said: "It was, in its nature, so remote and irrelevant to the matter in issue in the cause, that its effect would most probably have been to bewilder and mislead the jury, and would have opened a door by which the jury might have been involved in the trial of a complication of issues, the finding of which would have had no bearing on the questions which the jury were sworn to try." 5 *Gill*, 108. The same testimony has been again offered in connection with the opinion of a witness who stated that he was familiar with the handwriting of the defendant, and that, in his opinion, the signature to the paper in controversy was not in her handwriting, and that *Henry A. Edelen*, who is named in the single bill on which the suit is brought, died some twenty years since. This testimony was, we thing, properly rejected, so far as it related to *Henry A. Edelen*. For it must be obvious, that the objection to that portion of the evidence ruled to be inadmissible on the former

appeal, upon the ground of its intrinsic remoteness and irrelevancy, would not be obviated by the superadded testimony which it was proposed to introduce into the cause.

We reverse the opinion of the county court, as expressed in the first exception, and affirm their opinions in the second and third exceptions.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

JOHN H. MILBURN *vs.* JOHN GUYTHER.—*December*, 1849.

To warrant a defendant in pleading a set off, or filing an account in bar to an action at law, his claim must be of such a nature that he can sue for and recover it by a suit in a court of law. Legal claims, only, can form subjects of set off, or be filed as accounts in bar, in such a court.

If three or more persons, not partners in trade, and not purchasing with partnership means, become the purchasers of a vessel, they are regarded in law as part owners thereof, and not as partners; they hold the vessel as tenants in common.

But it does not thence follow, that upon the termination of the joint ownership by their authorised act, or during its continuance, they can maintain actions at law against each other, either for the recovery of the vessel, or their respective proportions of the freight; or that if one part owner, by the consent and for the benefit of all the owners, sells the vessel and receives the proceeds, each of the other part owners can separately sue at law for his portion of the proceeds of sale.

The ordinary remedy of part-owners to obtain an adjustment of the ship's account among themselves, is a suit in equity. All the part owners should join as plaintiffs for the recovery of the freight, because all of them are partners with respect to the concerns of the ship.

If part owners give a joint authority to an agent to sell the entire ship, they cannot maintain separate actions against him for their respective shares of the money, though each may do so if they separately authorised the agent to sell their respective shares of the ship.

Joint debts cannot be set off against separate debts, nor separate debts against joint debts, either at law or in equity.

With respect to parties, as between whom the right of pleading set offs, or filing accounts in bar, is allowed, the same rule which applies to the statutes of 2 and 8, of *George the 2nd*, is applicable to the 7th section of the act of 1785, ch. 46.

In this case the plaintiff sued the defendant for a separate debt between them. HELD: that the defendant could not set off against this action a claim for his share of the proceeds of sale and freight of a ship of which the plaintiff and defendant, with others, were joint owners, and which was sold by the former with the joint consent of all, and for the benefit of all.

Appeal from *Saint Mary's* county court.

This was an action of *assumpsit*, instituted by the appellee against the appellant, on the 18th of August, 1845. The pleadings and facts of the case are fully stated in the opinion of this court.

The cause was argued before DORSEY, C. J., MAGRUDER and FRICK, J.

By PRATT, for the appellant, and
By THOS. S. ALEXANDER, for the appellee.

DORSEY, C. J.. delivered the opinion of this court.

The plaintiff below, in his declaration, sought to recover of the defendant, on the usual counts of general *indebitatus assumpsit*, money lent and advanced, and money had and received. The defendant pleaded *non assumpsit*, and filed two accounts in bar against the plaintiff: the one charging him with $300, due to him from the plaintiff, for the sixth part of the proceeds of sale of the schooner "*W. T. Savin*," sold in the year 1837, and the other charging him with $60.07, one-sixth part of the freight received as the earnings of the schooner. To these accounts in bar, the plaintiff replied *non assumpsit*, and limitations and issues were joined thereon. At the trial, the plaintiff having proved his claim for money had and received, the defendant, to support the issues joined on his part, offered to prove to the jury that, in the year 1837, the defendant and plaintiff, and a certain *Jas. C. Milbourn* and *George*

Guyther, united in the purchase of a vessel called the "*W. T. Savin*," and that in 1837, the said vessel was sold by the plaintiff, with the consent and for the benefit of all the part-owners, for $1,800, which was received by the plaintiff. The defendant further offered to prove, by a competent witness, that in 1845, before the institution of this suit, the plaintiff produced to the defendant the two papers marked A and B, now exhibited, purporting to show the amount of freights received by the plaintiff, on account of the "*W. T. Savin*," and the expenses incurred by him whilst running the said vessel as captain and agent of the several partners; said papers A and B being produced to the defendant for the purpose of settling with him his share of said freights. The court having refused to permit this testimony, or any part of it, to go to the jury, the defendant excepted, and the correctness of such refusal forms the subject for the determination of this court, upon the appeal now before it. As showing that the testimony offered established the issues joined on the part of the appellant, and that, therefore, he has been injured by the court's refusal to permit it to go to the jury, the appellant insists upon three points: 1st. "That by the sale of the vessel, and the receipt of the purchase money by the plaintiff, each owner became entitled to receive, individually of the plaintiff, his part of the money so received by him, and that the one-sixth of such amount, to which the defendant was entitled, should have been permitted by the court to be set off against the plaintiff's demand against him." The principle thus asserted by the appellant in the first part of this point, is abstractedly and literally true: "that by the sale of the vessel, and the receipt of the money by the plaintiff, each owner is entitled to *receive*, individually of the plaintiff, his part of the money so received by him." And with equal truth the same may be predicated of every equitable claim for money, recoverable only in a court of equity, which a defendant may have against a plaintiff. But to warrant a defendant in pleading a set off, or filing an account in bar to an action at law, he must not only be entitled to receive the amount due him from the plaintiff, but his claim must be of such a

nature that he can sue for and recover it by a suit in a court of law. Legal claims, only, can form subjects of set off, or be filed as accounts in bar in such a court. The inquiry thence naturally arises, is the claim now preferred by the appellant against the appellee such an one as is recoverable in a suit at law.

It is not denied, that, as has been urged in the argument, if three or more persons, not partners in trade, and not purchasing with partnership names, become the purchasers of a vessel, they are regarded in law as part owners thereof, and not as partners; that they hold the vessel as tenants in common. But it by no means thence follows, that upon the termination of the joint ownership, by their authorised act, or during its continuance, they can maintain actions at law against each other, either for the recovery of the vessel or their respective proportions of the freight received by the part owners in the employment of the vessel; or that if one of the part owners, by the consent of all, and for the benefit of all the owners, sells the vessel and receives the proceeds of sale, as in the case before us, that each of the other part owners can separately maintain an action at law for the proportion of the proceeds of sale which he was entitled to claim of the part owner by whom the sale was made. In *Collier on Partnership, sec.* 1220, it is stated, that "the ordinary remedy of part owners to obtain an adjustment of the ship's account among themselves, is a suit in a court of equity." In section 1230, (where numerous authorities are referred to as sustaining the position,) it is stated, that all the part owners of a ship should join as plaintiffs for the recovery of freight; and the reason assigned for it is, "that all of them are partners with respect to the concerns of the ship." "And even if part owners authorise their agent to sell the entire ship, they cannot, if they gave him a joint authority, maintain separate actions against the agent for their respective shares of the money received by him, on account of such sale, though each may maintain a separate action, if they separately authorised the agent to sell their respective shares." From the proof offered and rejected in this case, no such separate authority to

sell can be deduced. In section 1231, of *Collier on Partnership*, the general rule is asserted, that part owners of a ship cannot sue separately for their respective portions. If they must all unite in a case where the proceeds of the sale of a ship or the freight are in the hands of a third person, the necessity for such union is equally imperative in the case before this court. And as one of the necessary plaintiffs in the action cannot unite in suing himself, who must be the defendant, the remedy in the case is by a bill in equity, where all the part owners must be before the court, either as plaintiffs or defendants. It cannot be pretended that, upon the testimony offered, there was any such settlement of accounts, or balance struck between the part owners, or between the plaintiff and defendant in this appeal, as would warrant the jury in finding such an express or implied promise as would entitle the former to the set off he has claimed from the latter, as a separate debt between them.

The second point on which the appellant has urged a reversal of the county court's judgment, is, "that if the plaintiff's indebtedness to the defendant is to be considered as a joint debt due from the defendant and others, it should have been permitted, so far as it belonged to the defendant, to be set off against the individual debt of the defendant to the plaintiff." This point assumes what this court, in its remarks on the first point, has declared cannot be done, that the other three part owners can, at law, maintain a joint action against the appellee. But suppose this assumption were granted, can the principle of law, asserted in this second point, be then sustained? That it cannot, we entertain no doubt. In *England*, a joint debt cannot be set off against a separate one, nor a separate debt against a joint demand. If authorities be required for so familiar a principle, they may be found in the 6 *Law Lib.*, 16, and *Collier on Partnership*, 1234. In 3 *Mason*, 145, *Jackson vs. Robinson*, and 2 *Summers C. C. R.*, 109, *Howe vs. Sheppard*, the broad doctrine is laid down, that "joint debts cannot be set off against separate debts, or separate debts against joint debts, either at law or in equity."

The cases referred to by the counsel for the appellant, where courts of law exercising an equitable jurisdiction, and, consequently, modifying its favors or relief to the varying and peculiar circumstances of every particular case before them, are inapplicable to the general principles of pleading by which such courts are governed in the determination of questions arising on pleas of set off, and accounts in bar. Nor can the distinction, as applicable to this point, be sustained, which has been attempted to be taken between the act of 1785, and the statutes of *England*, in relation to set off. With respect to parties, as between whom the right of pleading set offs, or filing accounts in bar is allowed, the same rule which applies to the statutes of 2 and 8 of *George 2nd*, is applicable to the 7th section of the act of Assembly of *Maryland*, of 1785, ch. 46. The language of which section is, that "the defendant may file an account in bar, or plead discount of any claim *he* may have against the *plaintiff;*" not such as he and others may have against the plaintiff, or which he may have against one of several plaintiffs.

The third point of the appellant, which is, that "if the owners of the vessel are to be considered as partners, then it will be insisted, that the partnership terminated by the sale of the vessel, (the only partnership property,) and that the defendant's one-sixth of the proceeds of sale, and of the freights received by the plaintiff, should have been permitted to be set off against the plaintiff's claim," is sufficiently answered in what has been said upon the appellant's first and second points. The judgment of the county court is affirmed.

JUDGMENT AFFIRMED.

Sarah E. Mitchell's Lessee *vs.* Henry S. Mitchell.—*December*, 1849.

Where a party includes in his claim and pretensions, the whole or any part of a tract of land, before he can offer evidence of title thereto, the lines of the entire tract must first be located upon the plats.

But if he seeks, by the location of particular boundaries or lines of an adjacent tract, to elucidate or support the locations of the lands he claims, or locations he may have made as auxilliary thereto, he need only locate such particular boundary or lines.

Where the beginning and other boundaries of a tract are lost, so that it is insusceptible of location by the ordinary means, a boundary or boundaries thereof may be proved by the location of a junior survey, whose lines call for such lost boundaries as the *termini* thereof.

If all the boundaries common to both surveys are lost, save one, which can be identified by its being stated in the junior survey as the beginning of a third tract, whose beginning can be proved, such proof, with the certificate of the junior survey, will establish it not only as the boundary of the third tract, but as that called for in both the senior and junior surveys.

A tract A, calls for a boundary at the *terminus* of its first line, which is also called for as the end of the third line of B, whose certificate states said bound to be, also, the beginning of W. If this boundary, or the place where it stood, be otherwise incapable of proof as a boundary of A, or of B, it may be established as the boundary of both, by proving it to be the beginning of W.

At the end of the first line of A, and of the third line of B, a boundary is established, from which A's second line, by its patent, runs 136 *perches* to a bounded tree, the actual *situs* of which cannot be proved; but B's patent, which is junior, runs its fourth line with and binding on A's second line, 139 *perches*, to B's third boundary, "at the end of the second line of A." Held: that the court should have instructed the jury, as a matter of law, that A's second line terminates at the end of 136 perches, as expressed in its patent.

A certified copy of a warrant from the land office is admissible in evidence in connection with the certificate, though the name of the register who issued it, be not appended to it.

Where a plaintiff located on the plats, for his claim and pretensions, all that part of a certain tract of land "which was in the possession of *F J M*," making no reference as to the time to which such possession related, it is not competent for him to prove, by witnesses, that *F J M* was in possession of said lands *for several years prior to his death.*

A witness is incompetent, where it does not appear by the plats and explanations that he had, upon the ground, pointed out to the surveyor the objects located, as to which he is called to testify.

A will offered not as evidence of location, but of title, need not be located on the plots.

Surveyors, in their explanations, should state what number of degrees they allow for variation; to say that they make the usual allowance for variation is too indefinite.

All the lines of a tract to which the plaintiff lays claim, must not only be truly located on the plots, but must be actually surveyed on the ground.

Original locations, if not counter-located by the opposite party, are admitted to be correct; but a counter-location of a counter-location, is a solecism of which we have no example.

Appeal from *Charles* county court.

This was an action of ejectment instituted by the appellant for twenty-one tracts of land particularly named in the declaration. The appellee, the defendant, being tenant in possession, took defence on warrant.

Upon the execution of the warrant of resurvey, the plaintiff located as his claims and pretensions, four of the twenty-one tracts, viz: "*Mitchell's Lot*," "*Wheeler's Rest*," "*Mitchell's Lot Resurveyed*," and "*Wheeler's Addition.*" He also located a parcel of land described in the explanation of the surveyor as "all that part of "*Wheeler's Rest*" which was in the possession of *Francis J. Mitchell*," and also made numerous locations *for illustration* of lines and boundaries which, in the explanations of the surveyor, accompanying the plots, are said to be "wholly lost and incapable of location." The defendant counter-located all the plaintiff's locations, and made specific locations of the lines and boundaries alleged to be lost and incapable of location.

The plots and accompanying explanations are not introduced into this statement, because it is thought they are sufficiently explained in the exceptions and opinion.

1st Exception. The plaintiff having offered in evidence the plots and explanations, proved by the surveyor that the patents for "*Wheeler's Lot*," "*Wheeler's Addition*," and "*Wheeler's Rest*," were truly located on the lines as claimed by the plaintiff, and that the certificate of "*Mitchell's Lot Resurveyed*," is also truly located; but that he only, by actual survey the first ten lines thereof, and from the remaining

lines by laying them down on the plots according to courses and distances, and that the same result would be obtained on the plots, and these lines would be located in the same way, if he had run them by actual survey on the ground. He also stated, on cross-examination, that he never ran, by actual survey, the lines of "*Mitchell's Lot*," but located the same on the plots by courses and distances. The plaintiff then read the depositions of *Samuel Ward*, now deceased, regularly taken on the 17th of June, 1846, in a cause between the plaintiff and defendant, for another tract of land, proving that the point A, where the witness was sworn, and where stand a stone and post, was the beginning boundary of "*Wards Delight*," and also a boundary of "*Stanley Enlarged;*" and then proved by the surveyor, that he was present when said *Ward* was sworn in that cause, and that the point A is the same as that located by the plaintiff in this case, as the second boundary of "*Stanley Enlarged.*" He then read in evidence the patent of "*Stanley Enlarged*," and proved the location of its second and third lines by course and distance, as laid down upon the plots. He then, further to prove the beginning of "*Ward's Delight*" at the point A, read the depositions of said *Ward*, taken on the survey in this cause, in substance that this point has always been reputed as the beginning of "*Ward's Delight*," and that it has always been the division boundary of "*Ward's Delight*" and "*Mason's Land*," as formerly held by the *Masons*. The plaintiff then, for the purpose of proving the second boundary of "*Stanley Enlarged*" to be identical with the beginning of "*Ward's Delight*," and for the purpose of sustaining the location of the second and third lines of "*Stanley Enlarged*," and the fourth and fifth lines of "*Mason's Amendment*," as made by the plaintiff on the plots, offered to read in evidence so much of the certificate of "*Mason's Amendment*" as relates to its fourth and fifth lines, having first proved that the surveyor, by whom this certificate was returned, died in 1845. But the court (Magruder, C. J.,) rejected said offered evidence, and refused to allow said certificate to be read to the jury, and the plaintiff excepted.

2ND EXCEPTION. The plaintiff then offered in evidence the aforesaid certificate, together with a certified copy of the warrant on which the same was founded; but the court refused to allow said certificate and warrant to be read to the jury, and the plaintiff excepted.

3RD EXCEPTION. The plaintiff then proved by the surveyor, that the point B, as located on the plots, is the end of the 2nd line of "*Stanley Enlarged*," as located from the point A, according to its patent courses and distances; and then offered to read so much of the evidence of said *Ward*, as relates to the point B, to the effect that this was the place where a stone formerly stood, which was a boundary of "*Mason's Land*," "*Jenken's Land*," and of a tract witness owns, called "*Arlow*," for the purpose of proving that a stone formerly stood at B, and that the same was reputed a boundary of three tracts of land; the plaintiff stating that he meant to contend and insist that said stone so referred to by said *Ward*, was the third boundary of "*Stanley Enlarged*." But the court rejected this evidence, and the plaintiff excepted.

4TH EXCEPTION. The plaintiff offered to prove, by *John A. Pye*, a witness sworn on the survey, that he was present, and saw the surveyor run the lines of "*Wheeler's Rest*," as located on the plots, and the lines of fencing numbered from 21 to 26, referred to in the explanations, and that for several years previous to 1825, when he died, *Francis J. Mitchell* was in possession of all the land included in the lines of that part of "*Wheeler's Rest*" which is located on the plots in the manner stated and described in the 35th and 36th explanations of the surveyor; but the court rejected this evidence, and the plaintiff excepted.

5TH EXCEPTION. To prove title to "*Mitchell's Lot*" in the plaintiff, he offered to read in evidence a duly certified copy of the will of the patentee, at the same time stating, by his counsel, that he meant to follow said offered evidence with further proof to show title in the plaintiff, derived from said patentee; but the defendant objected, because the said will was not located on the plots, and because "*Mitchell's Lot*" was not lo-

cated; and the court refused to allow the will to be read, and the plaintiff excepted.

6TH EXCEPTION. The plaintiff then offered to prove that *Francis J. Mitchell* was, in his lifetime, in possession of all the lands included within the double locations of part of "*Wheeler's Rest,*" as located in the 35th and 36th explanations, and died so possessed in March, 1825, leaving a last will and testament, a duly authenticated copy of which he offered to read in evidence, for the purpose of proving that said *Francis J. Mitchell* devised said part of "*Wheeler's Rest*" to *James D. Mitchell*, in fee-simple, at the same time stating that he meant to follow up said evidence by proof to show that his lessor was the sole heir at law of said *James D. Mitchell;* but the court rejected the evidence, and the plaintiff excepted.

7TH EXCEPTION. This last exception was taken by the plaintiff to the refusal of the court to grant six several prayers offered by him, which are stated in the opinion.

The verdict and judgment being for the defendant, the plaintiff appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MARTIN and FRICK, J.

By PARRAN and BRENT, for the appellant, and
By DIGGES and WM. SCHLEY, for the appellee.

DORSEY, C. J., delivered the opinion of this court.

Before an opinion can be formed as to the correctness of the court's rejection of testimony, as shown in the plaintiff's first bill of exceptions, it is necessary to ascertain what was the character and object of the testimony rejected. The plaintiff having produced a duly authenticated certificate of a tract of land called "*Mason's Amendment*," (in support of his locations upon the plots,) for the purpose of proving the second boundary of "*Stanley Enlarged*" to be identical with the beginning of "*Ward's Delight,*" for the purpose of sustaining his location of the second and third lines of "*Stanley Enlarged,*" and the

fourth and fifth lines of "*Mason's Amendment*," "thereupon offered to read in evidence so much of the certificate of "*Mason's Amendment*" as relates to its fourth and fifth lines as by him located;" but the court rejected the said offered evidence, and refused to allow the said certificate to be read to the jury as evidence in the cause. In this refusal the counsel for the appellee insists, that the court below were justified, because the entire tract of land called "*Mason's Amendment*" had not been located by the plaintiff. If the plaintiff had included in his claim and pretensions, the whole or any part of the tract of land called "*Mason's Amendment*," and sought its recovery as such before he could offer evidence of title thereto, the lines of the entire tract must first be located upon the plots. But if, as in the case before us, he seeks, by the location of particular boundaries or lines of an adjacent tract of land, to elucidate or support the locations of the lands to which he asserts title, or locations he may have made as auxiliary thereto, all that he need do is to locate the particular boundary or lines whose tendency is to sustain his other locations. As establishing the principle relied on by the appellee, in support of the county court's refusal, no authority has been referred to, and it is believed none can be found. The principles which govern locations upon plots, are founded upon reason, justice, expediency, and a due regard to the interests of suitors; none of which can be invoked in support of the doctrine now contended for by the appellee. Its necessary result would be uselessly, inordinately, and without any imaginable beneficial object to inflame the costs of litigation in almost all cases where locations of land on plats are resorted to.

Of the materiality of the testimony refused, if received, there surely cannot be a doubt, as it states that the boundary at the beginning of "*Ward's Delight*" is the second boundary of "*Stanley Enlarged*," and that the fourth line of "*Mason's Amendment*" runs with and binds on the second line of "*Stanley Enlarged*" to its third boundary, at the end of said second line, and that the fifth line of "*Mason's Amendment*" runs with and binds on the third line of "*Stanley Enlarged*" for

its entire length of one hundred and twenty-five perches. It is true, there is a slight discrepancy between the courses of the second and third lines of "*Stanley Enlarged*," and those of the fourth and fifth lines of "*Mason's Amendment;*" but it is apparent, by adverting to the dates of the certificates of survey of the two tracts of land, such diversity is nothing but the result of that reasonable and proper correction for the variation of the compass, as it is ordinarily called, which the surveyor who located "*Mason's Amendment*," found it necessary to make, in order to bind its fourth line on the second line of "*Stanley Enlarged*," to its boundary at the end thereof, and to make the fifth line of the former tract conform to the true original location of the third line of the latter tract. It is also true that the fourth line of "*Mason's Amendment*" calls to run three perches further than the line on which it binds, and with which it professes to terminate, to reach the third boundary at the end of the second line of "*Stanley Enlarged.*" But this incongruity is no ground for the court's refusal to suffer the certificate of "*Mason's Amendment*" to be read to the jury to sustain such locations as had been made of the boundaries and lines thereof. Nor did it interpose the slightest obstacle to the accomplishment of the designs contemplated by the plaintiff in making such locations Where the beginning tree, and also other boundaries of a tract of land are lost, and it is thereby rendered insusceptible of location by the ordinary means of proving any of its boundaries, *ut res magis valeat quam pereat*, that the owner may not lose his land for which he hath paid, and the State received, a full equivalent, the court will permit a boundary or the boundaries thereof to be proved by the location of a junior survey, the lines of which call for such lost boundaries as the *termini* thereof, by the proof that the objects called for are the boundaries of such junior survey, or by proof of the spots where such boundaries stood. But if all the boundaries called for, as common to both surveys, are lost, save one, which can be identified by reason of its being stated, in the junior survey, as the beginning of a third tract of land, the beginning of which can be proved,

such proof, with the certificate of the junior survey, will be sufficient to establish it, not only as the boundary of the third tract, but as that called for in both the senior and junior surveys. To apply this to the case before us: "*Stanley Enlarged*" calls for a boundary at its beginning, and also at the terminus of its first line, which latter boundary is called for as at the end of the third line of "*Mason's Amendment*," the certificate of which states said boundary to be also the beginning of "*Ward's Delight.*" If the boundary or place where it stood be otherwise wholly incapable of proof as a boundary of "*Stanley Enlarged*," or of "*Mason's Amendment*," it may be established as the boundary called for in both those surveys, by proving it to be the beginning of "*Ward's Delight.*"

The plaintiff having, by thus connecting the testimony of *Ward* with the certificate of "*Mason's Amendment*," obtained evidence which would warrant the jury in finding it as designated on the plots, to be the boundary expressed in the patent of "*Stanley Enlarged*," as standing at the end of its first line, how is the end of its second line, at which, as declared in the patent, stood a bounded oak, to be ascertained? All proof being unattainable as to the actual *situs* of this tree, either as a boundary of "*Stanley Enlarged*," or "*Mason's Amendment*," by reason of the county court's properly rejecting the testimony of *Ward*, as offered in the third bill of exceptions, for reasons which shall be hereafter assigned, is the end of the second line of "*Stanley Enlarged*," to be run with the fourth line of "*Mason's Amendment*," one hundred and thirty-nine perches, or is it to terminate at the end of one hundred and thirty-six perches, as expressed in the patent of "*Stanley Enlarged?*" At the latter point it must terminate; the court, as a matter of law, should so instruct the jury. And at that point the boundary may, perhaps, be regarded to have stood until the contrary is made to appear. The adoption of this well established principle of law, strongly recommends itself as the means by which the greatest certainty is attained in making such a location. It can then be made in but one way. But, if departing therefrom, you, in such case, adopt the course and

distance lines of other surveys with calls like the present, incapable of the ordinary proof to establish them; you may have two or more junior surveys locating the line and lost boundary in different ways and at different distances, leaving the jury without any fixed rule, confining them to the adoption of any one, or either of those locations; and thus that, which for the benefit of landholders the law has made certain, is submitted to the uncontrolled and uncertain finding of a jury. The county court erred in its exclusion of the certificate of "*Mason's Amendment*" for the purpose for which it was offered, from the consideration of the jury.

The court below erred (for the reasons assigned in the examination of the first bill of exceptions,) in rejecting the testimony offered in the second bill of exceptions. The certified warrant from the records of the land office, was clearly admissible as evidence in connection with the certificate of "*Mason's Amendment*," with which it was offered. The effort to sustain the opinion of the county court, because the copy of the record of the warrant under which the certificate of survey of "*Mason's Amendment*" was made, does not appear to have been signed by the register of the land office, is of no avail; the certified copy of the warrant being truly taken from the record book of the land office, in the recording of which warrants the names of the registers issuing them are not appended. Had it been the original warrant of the surveyor which was offered in evidence, it would have presented a very different question. Had the plaintiff located A and B as the boundary of "*Mason's Land*," and the fourth and fifth lines of "*Mason's Amendment*" as the fourth and fifth lines of "*Mason's Land*," and that the boundaries spoken of by the witness, *Ward*, as boundaries of "*Mason's Land*," meant boundaries of "*Mason's Amendment*," which was known as "*Mason's Land;*" and had not the county court erroneously rejected as evidence the certificate of "*Mason's Amendment*," it could not have been doubted, for a moment, that the testimony offered in the plaintiff's third bill of exceptions was admissible for the purpose for which it was offered. But such locations not hav-

ing been made, and the certificate of "*Mason's Amendment*" being excluded as evidence, there was no location of the plots which could be sustained by the rejected testimony, or to which it could be legitimately applied. The county court, therefore, could not err in rejecting it under the circumstances in which it was offered.

The fourth bill of exceptions presents the isolated question, whether *John A. Pye* was a competent witness to prove the facts to which he was offered to testify? The county court decided that he was not, and in that decision we entirely concur, for several reasons. The first is, that the plaintiff's locations of his claim and pretensions, in support of which the proof was offered, did not warrant the production of such testimony. The proof rejected was, that *Francis J. Mitchell*, for several years previous to the year 1825, when he died, was in the possession of all the land included in the lines of that part of "*Wheeler's Rest*" which is located on the plots, in the manner stated and described in the 35th and 36th explanations of the plaintiff's locations The explanations referred to, as stated by the surveyor, opened the door to the admission of no such proof. It was stated therein, that the plaintiff locates for his claim and pretensions, all that part of "*Wheeler's Rest*" which was in the possession of *Francis J. Mitchell*, beginning, &c., &c. It made no reference as to the time to which such possession related. For aught that appears in the explanations by the surveyor, it might as well have referred to a possession of *Francis J. Mitchell*, which occurred five, ten, or twenty years before his death, as to one that existed at the time thereof. The object of the locations in question, may have been to let in the proof of *Francis J. Mitchell's* dying seized of the land included within them. But that object does not sufficiently appear in the explanations of the surveyor, (which ought substantially to embody the plaintiff's instructions on that subject,) and, therefore, the defendant was under no obligation to counter-locate, or disprove such dying seized of *Francis J. Mitchell*. There was no such issue presented by the plots and explanations in the cause, and, consequently, no

such testimony was admissible before the jury. The second reason why the evidence offered should not have been received by the court is, that it did not appear by the plots and explanations in the case, that the witness produced to be sworn on the trial, had, upon the ground, pointed out to the surveyor the possessions and objects located on the plots, as to which he was called on to testify. The defendant, on that account, having no reason to anticipate his appearance as a witness at the trial, had no means of excluding him as an interested witness, if he were so, by locating his interest upon the plots. A third reason is, that the witness was offered to prove locations on the plots, of which the explanations do not show that he had any knowledge, or the means of obtaining it. It is true that the witness states he was sworn on the survey, (but where, or for what purpose, *non apparet*,) and saw the surveyor run the lines of "*Wheeler's Rest*," as located on the plots in this cause, and the lines of fencing numbered 21, 22, 23, 24, 25, 26, on the plots, and referred to in explanations; but these are facts which, for the most part, should appear on the plots and explanations, and of which the surveyor has knowledge, and should be permitted to speak, not the witness.

The county court erred, as is shown in the fifth bill of exceptions, in refusing to permit the duly certified copy of *Samuel Mitchell's* will to go to the jury, under the circumstances which attended its offer, as evidence. In the motion for its rejection by the counsel for the defendant, two reasons were assigned, but neither of them were sustainable. The first was, that it was not located on the plots. No such location was necessary. It was offered not as evidence of any location, but as evidence of title. It conveyed all the estate of the patentee in the entire tract of land to a devisee, under whom the plaintiff claimed title. That in such a case, such a title paper of a party need not be located, it cannot at the present day, be necessary to refer to authorities. The second ground of objection was, because "*Mitchell's Lot*" is not located. For this ground of objection there is no foundation in fact. It was located as appears by the plots and explanations in the cause, which were

in evidence to the jury, and the patent thereof, without objection had been read to them in support of such location, as will appear by referring to the plaintiff's first bill of exceptions.

The county court were warranted in rejecting the testimony offered in the plaintiff's sixth bill of exceptions, for the first reason hereinbefore assigned for the rejection of the evidence offered in the fourth bill of exceptions.

The plaintiff's seventh bill of exceptions (after the testimony had been given to the jury,) was taken to the refusal of the court below to grant each and all of six separate, distinct prayers of the plaintiff. The first of which was, "that there is competent evidence for the consideration of the jury, of the true beginning of "*Mitchell's Lot*," as located by the plaintiff in the plots and explanations in this cause."

The plaintiff's instructions to the surveyor, as is shown by his 13th explanation, state the beginning of "*Mitchell's Lot Resurveyed*" can only be found by reversing its nine first lines from the letter B, marked on the plots as the termination of the second line of "*Stanley Enlarged*," where its third boundary is described as having stood. For the purpose of ascertaining whether this first prayer of the plaintiff ought to have been granted, had all the testimony legally admissible, as stated in our comments on the first bill of exceptions, been before the jury, we necessarily assume the certificate of "*Mason's Amendment*" as having been before them. That being assumed, it is regarded as sufficiently established by proof to enable the jury to find that A is the second and B is the third boundary of "*Stanley Enlarged*," or, which is the same thing in the present condition of that tract, are the *termini* of its first and second lines. Its patent called for but three boundaries; one at the beginning, and the other two respectively at the ends of its first and second lines. Its beginning is to be found by reversing its first course from A, the number of perches given it by the patent. The ninth line of "*Mitchell's Lot Resurveyed*," is described as running to "a stone fixed in the earth," "a boundary of a tract of land called "*Stanley Enlarged*," thence with said "*Stanley Enlarged*" north eighty-eight degrees.

twenty-seven minutes, east one hundred and twenty-five perches." The call of the ninth line of "*Mitchell's Lot Resurveyed*," being "to a boundary of "*Stanley Enlarged*," and its appearing that there are three boundaries to that tract of land, the question necessarily presents itself, at which of said boundaries does this ninth line terminate? All doubt upon the subject will at once vanish by a comparison of the courses and distances of the three first lines of "*Stanley Enlarged*" with the tenth line of "*Mitchell's Lot Resurveyed.*" The boundary called for, cannot be either the beginning or second boundary of "*Stanley Enlarged*," because by thus locating the ninth line of "*Mitchell's Lot Resurveyed*," in running its tenth line, you must either wholly disregard its imperative binding call, or entirely violate its expressed course and distance. But, by making this ninth line to end at the ninth boundary of "*Stanley Enlarged*," there is a perfect identity both in course and distance, between the third line of "*Stanley Enlarged*," and the tenth line of "*Mitchell's Lot Resurveyed*," (the proper allowance for variation being of course made,) and the binding expression as to the latter line is gratified to the letter. There cannot, then, be a rational doubt as to the boundary called for as the *terminus* of the ninth line of "*Mitchell's Lot Resurveyed*," and by the reversal of the nine first lines of this survey from the letter B, the surveyor tells us he has found its beginning at the point marked on the plots at the letter D. In thus proving the beginning of "*Michell's Lot Resurveyed*," the beginning of "*Mitchell's Lot*" is also established; the former tract being a resurvey upon the latter, and calling to begin at its beginning. It is manifest, then, that it would have been "competent evidence for the consideration of the jury, of the true beginning of "*Mitchell's Lot*," as located by the plaintiff in the plots and explanations in this cause," upon the hypothesis assumed as to the survey, locations and testimony before the jury. The beginning of "*Mitchell's Lot*" being ascertained, it could be easily located, having none but course and distance lines from its beginning.

The plaintiff's second prayer was, "that it is competent for the jury, upon the evidence aforesaid, to find the second boundary of "*Stanley Enlarged*" to be at A, the termination of its second line to be at B, as located by the plaintiff." After the views expressed in the preceding part of this opinion, upon the hypothesis assumed as to the testimony and locations in the cause, the propriety of granting this prayer cannot be the subject of a momentary doubt.

And, upon the same assumption, it is equally manifest that the plaintiff's third prayer ought to have been granted, which was, "that if the jury shall find that the stone which is called for at the end of the ninth line of "*Mitchell's Lot Resurveyed*," stood at the end of the second line of "*Stanley Enlarged*," and that said second line terminated at B, then it is competent for the jury to find the lost beginning of the certificate of "*Mitchell's Lot Resurveyed*," by reversing the nine first courses thereof, according to their patent, courses and distances from the termination of said second line of "*Stanley Enlarged*," as located by the plaintiff at B." If the jury should find the facts made the basis of this prayer, not only were they competent to find as stated in the prayer, but if applied to for that purpose, it was the duty of the court to have instructed the jury, that they were bound to find the beginning of "*Mitchell's Lot Resurveyed*," at the point where the said nine reversed lines terminated.

The fourth prayer was, "that if the jury shall find the beginning of "*Mitchell's Lot Resurveyed*" to be at D, as claimed by the plaintiff, then it is competent for the jury to find the same place to be the beginning of "*Mitchell's Lot.*" The finding of this prayer upon the assumption stated in the first bill of exceptions, could not form a subject for controversy, as "*Mitchell's Lot Resurveyed*," by its certificate, explicitly declares its beginning to be "at a bounded white oak," the original beginning of "*Mitchell's Lot.*"

The fifth prayer of the plaintiff is, "that if the jury find the beginning of "*Mitchell's Lot*" to be at D, as located by the plaintiff, then it is competent for the jury to reverse from said

D the four first lines of "*Wheeler's Addition*," according to their patent courses and distances, to find the lost beginning of "*Wheeler's Addition.*" Upon the assumption hereinbefore mentioned, it is apparent that this prayer ought to have been granted, if we refer to the patent of "*Mitchell's Lot*," which describes its beginning to be "a bounded white oak, standing in a bottom at the end of the south-south-east sixty perches line of the said "*Wheeler's Addition*," which said line, by reference to the patent of "*Wheeler's Addition*," is shown to be the fourth line thereof, and professes to run "south-south-east sixty perches to a bounded white oak."

When speaking of finding boundaries by running or reversing lines according to their courses and distances, it is not meant that they are to be run according to such courses as are now shown by the point of the needle, but that the lines are to be run with such allowance for variation as, according to the testimony before them on the subject, the jury shall believe will best conform to the true original locations thereof. The instructions of the party, or rather the explanations of the surveyor, should show with what number of degrees of allowance for variation the lines of the several tracts were run, there being no known boundaries to control either the course or the distance. To say that they were run with the usual allowance for variation, is too indefinite, it does not give to the opposite party the notice to which he is entitled. But, it not plainly appearing that any such point was raised or decided in the court below, no such question can have any influence upon this court's opinion on the appeal now before it.

As a ground on which the opinions of the court below should be sustained, it has been urged that, as is shown by the testimony of the surveyor, the ten first lines only, of "*Mitchell's Lot Resurveyed*," were actually run upon the survey; but that the residue of its lines were simply located upon the plots according to their courses and distances, and that the same result would appear upon the plots by such a location, as if their location had been transferred to the plots after his actual running of the same, under the warrant of resurvey issued in this

cause. "*Mitchell's Lot Resurveyed*" being a part of the claim and pretensions of the plaintiff, all its lines ought not only to be truly located upon the plots, but they ought to have been actually surveyed under the warrant, that the defendant may see, upon the ground, the extent of the complainant's claim, and be, by reason thereof, the better enabled to make his arrangements to defend himself against it. The mere location upon the plots of the plaintiff's claim, communicates to the defendant little or nothing of that information which ought to be given him before he can be called on to assert his rights. By the mere inspection of the plots, he cannot be presumed to know what portion, or whether any of his land is sought to be wrested from him. He can only be assumed to possess such knowledge where there has been an actual survey of the plaintiff's lands in his presence, or where he has a right to be present, that are to be the subject of controversy in the cause. But none of the prayers or bills of exceptions in this cause raise any such question. The correctness of the location of the first ten lines, only, of "*Mitchell's Lot Resurveyed,*" are brought up in review before this court, and they, as a location for illustration, it is shown, were extended to the plots after an actual survey.

Another and yet more formidable obstacle to the plaintiff's right to recover, if maintainable, has been insisted on in behalf of the defendants, viz: that all the locations made by the defendant, of the various tracts of land and boundaries which the plaintiff, by his previous locations, or, perhaps, rather his instructions to the surveyor, which have been set forth in the explanations, as well for the information of the defendant as others, are admitted to be true, by reason of their not being subsequently counter-located by the plaintiff. If this admission can be fairly deduced from the plots and explanations of the surveyor, then, indeed, are most, if not all of the locations made by the plaintiff falsified and disproved, because locations of the various tracts of land, made either for illustration or as showing title, do not conform to the calls and expressions in the several grants for such tracts of land as located by the de-

fendant, and which, as is alleged, the plaintiff admits to be true. The object of a party in making original locations, either for illustration or as showing title, is, that he may prove them, if necessary, for the establishment of his claim and pretensions. And if such locations are not counter-located by the opposite party, their correctness is admitted. Counter-locations are made for different purposes, sometimes with a view to their being sustained by proof on the trial, but very frequently as the mere negation of an admission, a notification to the opposite party that these locations are not admitted, and that at the trial he must be prepared to prove them. The locations made by the plaintiff on the plots and explanations in this cause, in respect to the lost boundaries and tracts of land called for, and incapable of location, by reason of their boundaries being lost, were all that, under the circumstances of this case, the defendant had a right to require as the basis of his counter-locations; and the plaintiff was under no obligation to counter-locate such counter-locations of the defendant, to repel the inference of the admission of the truth of their location. A counter-location of a counter-location would be a solecism for which we have no example. What, then, is the character of the locations of the defendant in this cause, which are said to be admitted, because not counter-located? The defendant himself, who must be supposed to understand their nature and design in the explanations of the surveyor, which are but an echo of the defendant's instructions, calls them throughout, not the *locations*, but the *counter-locations* of the defendant. But let him have called them what he may, no other counter-location of them could be required of the plaintiff than he has already made. As parts of his original locations, he has, through the surveyor's explanations, *a priori*, given notice to the defendant, that the boundaries and tracts of land subsequently located by him are lost, and are wholly insusceptible of location. Is not this substantially as full a denial in advance of any locations the defendant may make, and as distinct a notification that should he make such locations, he must come prepared to prove them, as any counter-locations thereof that could be

made by the plaintiff? Besides, the statements thus made by the plaintiff, must be regarded as true until the contrary is shown. Would it not, then, under the circumstances in this case, be regarded as preposterous in the extreme, to require the plaintiff to make, as true locations, what we know he cannot possibly make, or to make mere fanciful locations to notify the defendant of what he has already been fully informed? Might it not, also, with some plausibility, be contended, that if the plaintiff does make locations of those lost boundaries and tracts of land, that all his other locations must be made to conform thereto, and thus the difficulties interposed to the recovery of his just rights, would be quadrupled, if not rendered wholly insurmountable. The introduction of such a doctrine into the ejectment law of *Maryland*, is utterly inconsistent with those sound principles of reason, justice, economy and expediency, which lie at its foundation

The county court having excluded from the jury the certificate of "*Mason's Amendment*," and the plaintiff not having made the locations specified in the commencement of our remarks upon the third bill of exceptions, it follows that there is no error in the ruling of that court in the third, fourth, sixth and seventh bills of exceptions taken by the plaintiff. Concurring with the county court in its decisions as stated in the third, fourth, sixth and seventh bills of exceptions, but dissenting from those decisions as appearing in the first, second and fifth bills of exceptions, its judgment should be reversed, and a procedendo awarded.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

B. T. Neale *vs.* The Vestry of St. Paul's Church.—*December*, 1849.

The act of 1802, ch. 111, authorising the incorporation of churches, is not to be restricted to individual churches or societies singly; but two different denominations may unite and form one society or congregation within the meaning of the act.

Appeal from *Washington* county court.

This was an action of *assumpsit* by the appellant against the appellees, who are styled in the declaration, "*The Vestry of the German United Evangelic Lutheran, and Evangelic Reformed Congregations, Saint Paul's Church, on the west side of Conococheague Creek*," in said county, The defendants appeared, and pleaded *non assumpsit*, upon which issue was joined.

At the trial, the plaintiff, to sustain the issue on his part, offered in evidence the paper recited in the opinion of this court, to which the defendants objected, as inadmissible in evidence, and this objection the court (Martin, C. J., Buchanan and Marshall, J.,) sustained. The plaintiff excepted, and appealed to this court.

The cause was argued before Dorsey, C. J., Magruder and Frick, J.

By John Thompson Mason, for the appellant, and
By George Schley, for the appellees.

Frick, J., delivered the opinion of this court.

The plaintiff, to sustain this action in the court below against the defendants, as a corporation, produced a paper purporting to be executed according to the act of 1802, ch. 111, and in due time recorded, which recites that—

"At the request of the "*German United Lutheran, and Evangelic Reformed Congregations of St. Paul's Church*," &c., the following regulations were recorded the 18th of January, 1806:

"We, the members of the "*German United Evangelic Lutheran, and Evangelic Reformed Congregations of St. Paul's Church,*" have, agreeably to an act of the General Assembly of this State, passed at a session in 1802, entitled, an act to incorporate certain persons in every christian church or congregation in this State, convened together this 21st of October, 1805, to form a plan, and adopt such rules and regulations as are indispensably necessary for conducting and managing our temporalities, agreeably to such act of Assembly, and unanimously agreed as follows:

"1st. All those persons shall be considered as regular members of these *united* congregations, who are at least twenty-one years of age," &c. The articles of association then go on to provide, that as each is to be attended by different ministers of the two aforesaid persuasions, both such ministers, for the time being, are to be considered members of the corporation; and that the election of such ministers, and all matters relating to the principles of either religion, must be left to each congregation separately. That the trustees shall consist of the duly elected ministers, *or minister, if but one*, for the time being, and ten other members, (five out of each congregation.) And by the 10th article: "*This corporation*, and their successors in office, forever, shall be vested with all the powers and authorities vested in them by the aforesaid act of Assembly, *as a body politic or corporate*, and shall provide for the management and preservation of all the property, buildings, implements, cash, &c., and apply them for the benefit of these united congregations, and provide for the support of *the church*, and the laborers therein."

To the admissibility of this paper in evidence, the defendants objected, and the objection being sustained by the court, the plaintiff excepted, and has appealed to this court.

The ground of the objection here taken is, that the provisions of this act of 1802, refer to each individual, particular church, society or congregation singly, and not to two or more associated together, with a view to the privileges conferred by it. We cannot consent to give to the act this restricted con-

struction. The design of the Legislature manifestly was, to secure to every christian association, by their own action on the subject, the rights and privileges which, prior to the act, it was usual to acquire by the separate action of the Legislature upon each case, as presented to them. It was intended to promote the cause of religion, by conferring on "religious societies equal rights and privileges in all things concerning the temporalities and government of their churches, congregations and societies, and without disturbing private opinions, or affecting the right of judgment in matters of religion, to make provision for their several exigencies in affairs of a temporal or civil nature, as far as difference of circumstances would admit." Such is the tenor of the whole preamble to the act, confining the intended privilege to associations *christian* in their profession of faith, but under that designation extended to "*every church, society or congregation.*" And such are the terms of the enacting clause of the act. It certainly cannot be intended to erect a barrier between different denominations of christians, and prevent their union on common ground, at least with regard to the temporalities and secular administration of their property. Yet such would be the necessary result of the restricted construction contended for by the appellees, at the same time, that such an overture of harmony and mutual forbearance, uniting parties in one common purpose of religion, would rather promote than contravene the spirit of the act.

Here it is objected that *two* societies united for the purposes contemplated. Does not the very act of union constitute them *one?* Not that they have united in doctrine; that they expressly reserve. But united certainly in name and designation, "*a church;*" as one corporation with respect to the property owned and possessed by them, and the mutual enjoyment and dedication of it in common for religious purposes.

And, upon their face, these articles of association purport to be one act of incorporation, under the united names and designation of the parties. They are constituted "one body politic," "society," or "corporation," with one "body of trustees," within the number prescribed by the act, for the pur

poses expressly stated in the act, to manage the temporalities of the corporation. And so constituted, the act did not design to enquire, whether such association and union was made of conflicting and discordant materials, or to prescribe that every denomination of christians should be confined within its own limitations of doctrine. The privilege of the act is offered to *all*, by including every christian church. And it can be no objection that two or more unite to constitute *one* society or congregation, though differing in principles of discipline or doctrine which each may reserve to itself. That every christian church may assert the privilege, does not necessarily imply that two may not unite; especially if such union is designed and expressed to constitute them one, for all the ends contemplated by the act, as heretofore recited from the preamble.

These parties style themselves, throughout, a corporation; and all the provisions under which they have united, as expressed in their articles of association, are clearly within the operation and meaning of the act. It is impossible that the act could contemplate that any one society or congregation might act singly in the premises, but that if two unite for the same purpose, the application must be addressed to the Legislature to sanction such union, provided the object of such union and incorporation into one, be otherwise within the spirit of the act.

There is, then, no such incompatibility as to render this union repugnant to the act. It may result from the connection of the parties that the whole may be made responsible for the debts or contracts of one party, within the terms of their association. But this is no more than a necessary consequence resulting from their own compact together. Constituting themselves one corporation, renders the joint property liable for the legal obligations contracted by them. It is their own act, and the legal consequences that result from it, they are not now at liberty to deny or evade.

To permit them now to stultify themselves, (even if the question were doubtful,) would be gross injustice to innocent creditors with whom they have contracted. They have pre-

sented themselves before the community, for a period over forty years, as a corporation exercising, and competent to exercise corporate functions. Through all this period they have claimed to enjoy the benefits and privileges of their association. They have adopted and used, throughout, their corporate style of union before the world, in the administration of their religious and secular concerns. They have, moreover, answered to that name, and under it have pleaded to the present action. It is too late now, when called upon to maintain the fidelity of their contracts, to sever their union, and renounce the character in which they assumed them, and in which they still stand, at least for all the purposes of the present action.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

PERRY SHANKS *vs.* JOHN T. DENT, EXECUTOR OF ELLEN T. ALLSTAN.—*December*, 1849.

After parol evidence of the contents, date, &c., of a draft had been given, without objection, by one witness, and a second witness had also testified in regard to the same paper, it is too late to object that such evidence is illegal testimony, because the draft itself, which was in possession of the party in court, but not exhibited in evidence, was the best proof of these facts.

It is not necessary, in order to sustain the count for money had and received, to show that money, in fact, has been loaned. In this case, the loan to the defendant of a bond executed by third parties in favor of the plaintiff, was held sufficient to support this count.

Appeal from *Saint Mary's* county court.

This was an action of *assumpsit* brought by the appellee, as executor of *Ellen T. Allstan*, against the appellant, on the 3rd of July, 1847. The declaration contains counts for goods, wares, &c., sold and delivered, money laid out and expended,

money lent and advanced, money had and received, and an account stated. The plea was *non assumpsit*.

The plaintiff, to support the issue on this plea, proved, by *Thomas Maddox*, that defendant came to witness, some time in the year 1845, with the bond of *J. Blackistone* and *J. L. Allstan*, payable to the order of plaintiff's testatrix, and by her endorsed, dated 28th of August, 1844, and asked witness to advance the money on said bond to him, and stated to witness that the plaintiff's testatrix had loaned him, defendant, said bond, for the amount of which he had given, or was to give said testatrix his bond. That witness gave to said defendant, or some one else, he thinks, and believes it was defendant, a draft on time, he does not know at what length of time, dated some time in the autumn of 1845, and drawn on *Neale & Luckett, Baltimore*, for $976.48, and paid defendant $20 or $30, upon which defendant endorsed and assigned to witness said bond so loaned to the defendant by said testatrix, which is still unpaid. Witness further stated that he had paid to *Neale & Luckett* the amount of said draft. The plaintiff further proved, by *Benedict Gough*, that the draft spoken of by *Maddox* was endorsed to witness as deputy sheriff, by defendant, in settlement of executions in his hands against said defendant. The defendant then prayed the court to exclude all parol evidence of the contents, date, amount of, or time said draft was drawn at, or of the endorsement thereon, as illegal testimony, said draft which was produced being the best evidence to show these facts; but the court (Magruder, C. J., and Key, A. J.,) refused the prayer of the defendant, to which overruling and opinion of the court, the defendant excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Spence, Martin and Frick, J.

Causin and Pratt, for the appellant, insisted:

That no action of *assumpsit*, growing out of the negotiation of the bond assigned by the plaintiff's testator to the defendant

was legally maintainable; and that if the plaintiff had such right of action, the better evidence of the draft, itself, should have been given to the jury; and upon the authority of *Morgan vs. Morgan, adm'r of Booth*, 4 *G. & J.*, 401, if the first conclusion is true, the judgment will be reversed without sending the case back.

RANDALL, for the appellee:

The proof of the *contents*, &c., of the draft were offered in evidence without objection, and without proof of the existence of the draft, and it was, after this, too late for the defendant to make this prayer on the production of the draft. 8 *G. & J.*, 214, *Marfield vs. Davidson.*

The cases are numerous to show that an action of *assumpsit* will lie for the sale, loan or transfer of a bond, as proved in this case. 13 *East*, 20, *Pickard vs. Barks.* 11 *Mass.*, 494, *Randall vs. Rich.* 11 *Johns.*, 464, *Beardsly vs. Root.* 3 *Mass.*, 403, *Floyd vs. Day.* 3 *Campb. N. P. C.*, 199, *Andrew vs. Robinson.* 1 *Dall*, 222, *Easwick vs. Hugg.* 15 *Maine*, 285, *Hinkley vs. Fowler.*

CHAMBERS, J., delivered the opinion of this court.

The court below was asked to "exclude all parol evidence of the contents, date, &c., of a certain draft, as illegal testimony, the original which was produced being the best evidence to prove these facts." The case has been argued as if the draft said to be "produced," was in the possession of the party in court, but not exhibited in evidence, and we are willing so to understand the exception. It appears, by the statement in the exception, that all the evidence had been given without objection, and a second witness had also testified in regard to the same paper before the objection was made. We think the facts bring this case completely within the principles adopted by this court in 8 *G. & J.*, 209, *Marfield and Davidson, and Dent and Hancock*, 5 *Gill*, 120.

But the appellant's counsel have contended, that as the testimony, when received, could have no legal effect in making a

case on which a recovery could be had, it ought to have been ruled out. It is contended, that as the proof was only calculated and designed to prove a loan of the bond, it should have been rejected, because, in this action, the plaintiff could not recover, if that fact were satisfactorily proved. The declaration contains the usual money counts, and amongst them a count for money had and received; but it is said to be necessary to sustain this count, that money, in fact, must be shown to have been loaned. This court has very lately had occasion to discuss this doctrine much at large in the late case of the *Susquehanna Railroad Co. vs. Faunce and Passmore*, decided at December term, 1846. 6 *Gill*, 68. The opinion of the court there, completely covers the ground now contested. If, therefore, the form of the exception allowed the question to be raised, of which there is much doubt, we should have no hesitation in saying the testimony was not inadmissible, because it was calculated to prove the loan of the bond, that being one link in the chain of evidence upon which, when completed, by proof that the Bond was treated and received as money, the plaintiff would be entitled to a verdict in the present form of action.

JUDGMENT AFFIRMED.

ISAAC H. JONES *vs.* THE PRESIDENT AND DIRECTORS OF THE MECHANICS BANK OF BALTIMORE.—*December*, 1849.

In this case, the question whether money lost at play can be recovered by the loser after it has been paid, in an action for money had and received, was argued, but not decided.

Appeal from *Baltimore* county court.

This was an action of *assumpsit* instituted by the appellant against the appellee. The declaration contains counts for

work and labor, goods sold and delivered, money lent, and money had and received, and also a count upon an account stated. Plea, *non assumpsit*, on which issue was joined.

The plaintiff offered in evidence, by *John Q. Hewlett*, that he was the guardian of plaintiff, and had in his hands, as such guardian, $12,000, on the 15th January, 1845; that on the 2nd of July, when *Jones* was about twenty-six years old, he received of witness, on account of his estate, $1,500, on the 5th of July, $1,800, and on the 9th, $2,000; that witness then went from home, and on returning, about the 2nd of August, plaintiff gave orders to witness to pay the following sums, which he had borrowed during witness' absence: *James Harvey*, $1,500, *Pendexter & Allen*, $400, *J. H. Bleakley*, $1,000, *Smith & Atkinson*, $500, *H. Deford & Co.*, $500, *J. Hartman*, $300, *T. R. Matthews*, $300, *L. Thompson & Co.*, $600, *Murry Jones*, $700. And further proved, by said *Hewlett*, that plaintiff's vision was not good. He then proved, by *Mr. Harvey*, that he lent plaintiff, on 22nd July, 1845, $500, on 25th July, 1845, $1,000; and by *Mr. Thompson*, that he lent plaintiff, 17th July, 1845, $300, and on 29th, $300. All of which sums were lent to plaintiff in checks upon the *Union Bank*. And also proved that the defendant, *Perry*, up to this period, was very poor, had no visible means, and was hard pressed for money in small parcels; that he borrowed small sums, and in 1844, $20, which he has never returned. That in the early part of July, 1845, witness suspecting *Jones* of gambling, followed him to the *European House*, where he met *Perry*, and where they drank. *Perry* and *Jones* then went to four other places and drank, *Perry* paying, when witness, being known to and discovered by *Perry*, went away. The plaintiff further proved, by *William James*, that he occupied a room above that in which a faro bank was kept by *George Jones & Campbell;* that from about the latter part of June, 1845, up to the 2nd of August of the same year, *Perry* and the plaintiff were constantly in the habit of visiting said faro bank, sometimes playing all day, they being the only players in the room; that on some occasions plaintiff would bring

to the bank large sums of money, (on one occasion $1,000,) and plaintiff and *Perry* played jointly against the bank, with the money; that on other occasions money was borrowed from the bank, on the credit of the plaintiff, and played with by plaintiff and *Perry;* that this continued until plaintiff lost all his money. *William James* also proved that *Jones* played at said faro bank a few weeks before he commenced playing with *Perry*, in company with one *Shallencoss* and *Morrison*, and that *Jones* was a very inexperienced player, though he sometimes won. *John Q. Hewlett* further proved that *Jones* was a young man, very amiable, and of capacity as good as usual; and further, that on the 7th August, *Perry* came to the *Mechanics Bank*, and brought ten one hundred dollar notes of the *Union Bank*, which he deposited, and on being asked if he would have a book to enter his deposit in, declined; that after some hours, he returned with another $100 of the *Union Bank*, which he also deposited, and said, as it was an old woman's money, he wanted a receipt for it, and a book in his own name. The defendant, *Perry*, gave no evidence of how or when he had obtained this money. The plaintiff further proved that no demand has been made for said money by any one since said deposit was made. And also by *F. P. Lovegrove*, that about the 25th July, 1845, a bill of *Perry's* was presented to witness, by an officer, for $1.75; that witness remonstrated with said *Perry* about so acting, upon which he stated that his necessities obliged him to do so.

The plaintiff having abandoned all of the counts in the nar, except that for money had and received, defendant prayed the court to instruct the jury:

1st. That there is no evidence to sustain the count for money had and received by the defendant, for the use of the plaintiff.

2nd. That if the jury should believe, from the evidence, that the bank notes deposited by *Perry* in the *Mechanics Bank*, were won by the said *Perry* from the plaintiff at play, yet the plaintiff cannot recover in this form of action.

The court (Le Grand, J.,) granted the first, and refused

the second prayer; whereupon the plaintiff excepted, and appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Magruder and Frick, J.

By Geo. H. Richandson, Attorney General, for the appellant, and

By T. P. Scott and Chas. H. Pitts, for the appellees.

Martin, J., delivered the opinion of this court.

It is to be observed in this cause, that there is not a particle of evidence to be found in the record, from which the jury could find that the money in controversy, or, indeed, any money was won at play from the appellant, by *Robert Perry*. It was shown by the proof in the cause, as exhibited by the appellant himself, that the appellant and *Perry* played conjointly against the faro bank, with the money of the former, but that they did not play against each other. It is apparent, therefore, that the proposition argued at the bar, with respect to the question whether money lost at play can be recovered back by the loser, after it has been paid, in an action for money had and received, is a mere abstract point, upon which it does not become this court to express an opinion.

In the argument of this cause, the counsel for the appellant relied upon the two following propositions: *First*. That there was evidence in the cause to go to the jury, that the money deposited in the *Mechanics Bank*, by *Perry*, was the money of the appellant. *Secondly*. That there was evidence to go to the jury, that the said money was obtained from the appellant by a fraudulent conspiracy between *Perry*, *Campbell* and *James*, the two latter mentioned in the record as the keepers of a faro table.

We are satisfied, after a careful examination of the facts detailed in the bill of exceptions, that neither of the above positions can be maintained. Evidence was introduced by the appellant, showing that in the month of July, 1845, he bor-

rowed from various persons in *Baltimore*, large sums of money, and received from them checks for the sums loaned, on the *Union Bank*. But we look in vain in the record, for any testimony from which the jury could find that these sums were drawn by the appellant from the *Union Bank*, in bank notes corresponding in their denomination with those deposited in the *Mechanics Bank* by *Perry;* and not a single fact or circumstance was produced from which the jury could infer that the money borrowed by the appellant, from the different individuals mentioned in the exception, ever reached the possession of *Perry*. The same difficulty exists with respect to the second point made by the counsel for the appellant. No connection or association in the faro bank, or its profits, was shown to have existed between *Perry*, *Campbell* and *James*, the two latter being the keepers of the table. And it is impossible to discover in the record any fact from which an intelligent and rational mind could deduce the inference that the money in controversy was obtained from the appellant by a fraudulent conspiracy in which *Perry* participated.

We find from the record, that the appellee, at the trial of the cause in the court below, asked the court to give to the jury the following instructions: *First*. That there is no evidence to sustain the count for money had and received by the defendant, for the use of the plaintiff. *Secondly*. That if the jury should believe, from the evidence, that the bank notes deposited by *Perry* in the *Mechanics Bank*, were won by the said *Perry* from the plaintiff at play, yet the plaintiff cannot recover in this form of action.

We have already said that there was, in this case, a total failure of evidence upon the part of the plaintiff, and upon this ground the county court were clearly right in granting the defendant's *first* prayer. They were correct, also, in rejecting the defendant's *second* prayer. For, assuming that the case, as presented by the plaintiff, was entirely unsupported by testimony, it is obvious that the point raised by the defendant's second prayer was merely abstract and speculative, and, as as such, should not have been entertained by the court.

Upon these grounds we shall direct the judgment of the court below to be affirmed. We desire, however, to be understood as intimating no opinion with reference to the various legal propositions raised and discussed at the bar. They are not before us according to the view we have taken of the evidence in the cause, and any opinions we might express, with respect to these questions, could be regarded as no more than the mere *dicta* of the court.

JUDGMENT AFFIRMED.

ELIZABETH MILLER AND OTHERS, *vs.* THE BOARD OF COMMISSIONERS OF PUBLIC SCHOOLS OF THE CITY OF BALTIMORE, AND DAVID STEWART, ADM'R OF HENRY MILLER. *December*, 1849.

An illegitimate child, whose parents never married, died intestate and without issue. HELD: that neither his mother nor her legitimate children, had any claim to his estate, under the act of 1825, ch. 156.

By the common law, bastards, having no inheritable blood, are incapable of taking as heir to the putative father, mother, or any one else.

The 7th section of the act of 1820, ch. 191, legitimates only where the parents subsequently marry, and recognise such child.

The act of 1825, ch. 156, only enables an illegitimate to inherit from the mother, and from illegitimate brothers and sisters.

Illegitimates cannot take from the legitimate, neither can the legitimate inherit from them.

Acts in derogation of the common law, must receive a strict construction.

Appeal from the Orphans court of *Baltimore* county.

The appeal in this case was taken by the appellants, from an order of said orphans court of the 5th of April, 1849, directing the administrator of *Henry Miller*, deceased, a bastard, to pay over to the *Board of Commissioners of Public Schools of the City of Baltimore*, the balance due the estate of said deceased.

under the act of 1845, ch. 120. The facts of the case are fully stated in the opinion of this court.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN, and FRICK, J.

By T. P. SCOTT, for the appellants, and
By WM. F. FRICK, for the appellees.

FRICK, J., delivered the opinion of this court.

Henry Miller, who was an illegitimate child, died unmarried and without issue, in the year 1844, leaving his mother, two sisters and a brother, who claimed to be the representatives and distributees of his estate. The sisters and the brother are the legitimate children of the mother by her deceased husband, who was not, however, the father of said *Henry Miller*.

Letters of administration upon his estate were granted to *David Stewart*, executor, one of the appellants, from the orphans court of *Baltimore* county, and the balance in hand was by him submitted for distribution under the order of said court.

The act of Assembly of 1845, ch. 120, requires that the justices of the orphans court of *Baltimore* county shall direct the funds arising from the personal estates of persons of the city of *Baltimore*, who have died or may die intestate, and have not or may not leave legal representatives, to be paid to the board of commissioners of the public schools of the city of *Baltimore*, to the use and support of said schools. Under this act of Assembly, the commissioners of the public schools of *Baltimore* city filed their petition in the orphans court, claiming to be paid the funds in the hands of the administrator. On the other hand, the appellants resist this application, and claim as the legal representatives of the deceased, under the terms of the act of 1825, ch. 156. 1st. They all claim, the mother, sisters and brother, as distributees in equal proportions; or, 2nd. If the mother should be excluded by the terms of the act, then in equal parts between the sisters and brother.

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The act of 1825, ch. 156. declares: "that the illegitimate child or children of any female, and the issue of such illegitimate child or children, be and are hereby declared to be capable, in law, to take and inherit both real and personal estate from their mother, or from each other, or from the descendants of each other, as the case may be; provided nothing herein contained shall be construed to alter or change the law respecting illegitimate persons whose parents marry after the birth of such persons, and who are by them acknowledged, agreeably to the 7th section of the act of 1820, ch. 191."

This section of the act of 1820, is but a reiteration of the same section, in the same words, of the act of 1786, ch. 45: "And be it enacted, that if any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated, and capable, in law, to inherit and transmit inheritance, as if born in wedlock."

The decree of the orphans court being in favor of the commissioners of the public schools, from that decision the present appeal is taken to this court.

By the common law, bastards, having no inheritable blood, are incapable of taking as heir either to the putative father, mother, or any one else. In every well digested scheme of social and civil polity, it has always been a prominent object to prevent the mischiefs of illicit intercourse; and the fruit of such intercourse has been invariably blended and branded with the guilt of the parent. The infamy of the transgression descended to the child, while the estate of the parent passed over to the more distant kindred, or escheated to the State. Such was the policy of the common law, and so it remains in this State, with only such relaxation as the Legislature has engrafted upon it by the preceding act of Assembly. The bastard is still *nullius filius*. The sin of the parent still attaches to the child in this respect; but so far as the Legislature could justly temper the severity of the sentence, and regard the unoffending character of the offspring, they have done so. The act of 1786,

further confirmed in 1820, reserves to the guilty parents the *locus penitentiæ*. By marriage and subsequent adoption of the child, the sin is atoned for, and the penalty of the law remitted. The policy of the law is thus gratified, and the child to all intents and purposes, is here legitimated. So far, and on these conditions, the rule of the common law is repealed, that punishes the offspring for the guilt of the parent. Beyond this the Legislature refused to go, in 1820, or to alter one word of the act of 1786, upon the subject, while reducing into one system the acts relating to descents. Only where the atonement was public, by a marriage and subsequent recognition of the child, was the taint of blood and civil disability remitted. To remove this stigma, was no part of the design of the act of 1825. It does not propose to legitimate the offspring. So to construe it, would be a virtual repeal of the provision of the act of 1820. It would restore the disabilities of bastards, without either marriage of the parties, or open recognition of the offspring. It could not intend to make the illegitimate the legitimate child of the mother, for all purposes *de jure et de facto*. It is expressly directed to the children of parents, where marriage is supposed impracticable, and endows the child only with inheritable privileges *from* the mother. It recognises no father, and establishes, of course, no relation of brother and sister. And to preclude such possible construction, the proviso is added, retaining in full force the position of the 7th section of the act of 1820, that no such consequence shall result, but from subsequent marriage and adoption of the children.

The disqualification is, therefore, only so far removed as to enable an illegitimate to inherit from the mother, and from illegitimate brothers and sisters. If, from any cause, the parents never marry, the children remain illegitimate.

Henry Miller, then, being illegitimate born, and his parents never having married, the mother can have no claim under our statutes of distribution. It was manifestly the policy of the common law that she should not; for the sin there denounced, still attaches to her. To permit her to share in the distribution, unless it be within the express terms of the act, would be to

sanction, not discourage illicit connections. Such sanction is not to be found in the act. It simply declares, that the children being illegitimate, may inherit from her, and from each other, "as if born in wedlock." The favour bestowed, the relaxation made, is in behalf of the children, and to their benefit the act is restricted. They may not take from the legitimate, neither can the legitimate inherit from them. There is no reciprocity intended, and between these, the act recognises no such relation as brother and sister. The illegitimate is still, in contemplation of this act, *nullius filius*. Without a recognition of both father and mother, there can be no recognised brothers and sisters in law. The remedy for this is to be found in the act of 1820, where the parents are free to make retribution to society, and wipe from their offspring the stain and dishonor of their illegitimate birth.

The act before us, is both humane and politic in its object. The illegitimate offspring is sufficiently degraded by the crime of the parents, and the stigma of the world, without being deprived of the only reparation that the circumstances may justify. The law may not restore the taint of blood but upon the conditions referred to. Still, while the relation of the mother to the child can always be rendered certain, no reason exists why the children should be left destitute of such relief as may be derived from the mother, or among themselves. So far the Legislature designed to abate the rigor of the common law, to relieve the innocent offspring from a portion of the penalty incurred by the sin of the mother. In this view the terms of the statute are plain and unambiguous, and all further inquiry into the intention of the Legislature, and the equity of the statute, is shut out. The words expressly restrict it to the relation there stated among the illegitimates, excluding the legitimates from any participation. The provisions of the act are in derogation of the common law, and for that reason, they must receive a strict construction. Neither of the parties, appellants here, can claim under it. The mother is incompetent, unless the disqualification has been removed by marriage, and the child legitimated for all purposes; and the brother and sisters, born in

wedlock and legitimate, have no claim to fraternity with the illegitimate, to whom the terms of the act exclusively refer. That the illegitimate cannot claim, under this act, to take the estate of a legitimate brother, has been heretofore decided in this court, in the case of *Medcalf vs. Daley and Jones*, (1845, manuscript,) and the converse of the proposition being equally true under the act, the decree of the orphans court of *Baltimore* county is affirmed.

DECREE AFFIRMED.

GEORGE H. SMITH, EXC'R OF ELWILEY SMITH, *vs.* THOMAS W. MORGAN.—*December*, 1849.

Evidence which, standing alone and unexplained, would not be competent testimony, may become admissible when followed by other explanatory evidence before objection taken.

In an action of replevin by an executor, a distributee of the testator's estate is an incompetent witness for the plaintiff, on the ground of interest.

A release by the distributee, of her interest in the property in dispute in the replevin suit, without releasing her entire interest in the estate, will not restore her competency, because she is still interested in the augmentation of the estate.

The plaintiff, to restore the competency of this witness, the daughter of the testator, offered the will of the testator, by which the negro in dispute was given to witness, "for her sole and separate use, exclusive of the control of her husband, during her natural life," and also a release executed by witness and her husband. HELD: that this did not render her a competent witness.

Neither the wife alone, nor the husband and wife conjointly, can, at law, divest the wife's interest in property which she holds to her sole and separate use.

The acts and declarations of the testator, in regard to the ownership of the negro, for which this action was brought by the executor, are admissible in evidence as part of the *res gesta*.

The will of the testator is admissible as a declaration and claim of possession and property to the negro in dispute, by the testator, in his lifetime.

In an action of replevin, the defendant pleaded *non cepit*, property in himself, and property in a stranger. The plaintiff, by his replication, joined issue on the first plea, and traversed the second and third by affirming property in himself. Upon which traverses issues were joined. HELD: that these pleadings were correct, being in conformity with the forms used and practiced under from an early period in the history of the practice of this State.

The clerk entered the verdict, that on the 1st issue, the defendant did not take the property, &c.; on the 2nd, that the property was in the defendant; and on the 3rd, that the property was in a stranger. HELD: that this verdict was for the defendant, and the entering it in this form was a clerical misprison, amendable by this court, under the act of 1809, ch. 153.

Appeal from *Saint Mary's* county court.

This was an action of replevin instituted by the appellant, as executor of *Elwiley Smith*, deceased, against the appellee, on the 15th of July, 1845, to recover a negro slave named *Matthias*, the alleged property of the plaintiff's testator. The defendant pleaded *non cepit*, property in himself, and property in a stranger, following the forms of those pleas in 2 *Har. Ent.*, 247, 300. The plaintiff, in his replication, joined issue upon the first plea, and traversed the two last by averring property in himself, and upon these traverses issues were joined, following in his replication, traverse, and joining of issue, the forms on page 247 of the *same book*.

1ST EXCEPTION. The plaintiff proved, by *Wm. H. Dunkinson*, a competent witness, that the negro in dispute was the child of a negro woman, the property of plaintiff's testator, raised him and held him in his possession until January 1832, when, with other negroes, he was sent by said testator to work on a farm commenced to be worked by testator's daughter, *Mrs. Campbell*. That so far as witness knew, said testator exercised acts of ownership over said negro till his death, in 1845. That *Mrs. C.*, for several years prior to her commencing farming, had lived with the testator on the farm where the negro in dispute lived.

The defendant then proved, by *M. C. Jones*, that in a conversation held with testator, sometime prior to *Mrs. C's* commencing farming, and while she was living with testator, and

while said negro was upon the farm, and in possession of the testator, he, the testator, told witness that he had given said negro to *Mrs. C.*, his daughter, in place of a negro belonging to his daughter, which he had sold and *used the money for*. That at the time of this conversation, the testator had called on the witness for the purpose of renting a farm, which the witness had the control of, for *Mrs. C.*, and which was rented to *Mrs. C.*, and shortly after this conversation, said negro went with *Mrs. C.* on the farm which she had thus rented, and continued in her possession during her widowhood, and since her intermarriage with *Thomas H. Miles*, have been in his possession to the present time.

The plaintiff then prayed the court to instruct the jury, that if they find, from the evidence, that the negro in controversy was in the possession of the testator at the time when he made said declaration to said *Jones*, and had always remained in his possession previous to said conversation, and remained in the testator's possession after said conversation until *Mrs. C.* commenced farming, then the legal title to said negro passed to *Mrs. C.* under the gift mentioned in said conversation. The court (Magruder, C. J.,) refused to give said instruction, because the whole testimony offered to the jury, in regard to the alleged transfer of said negro by testator to *Mrs C.*, is to be taken in connection with that of *Mr. Jones*, and weighed by the jury, and the testimony in the cause does not authorise the court to instruct the jury, that there was no valid transfer of said negro to *Mrs. C.*, by the said testator. The plaintiff excepted.

2nd Exception. The plaintiff then offered to prove, by *Col. Coombs*, that *Mrs. C.*, prior to her going on her farm, called on witness to go her security on a bond, and stated to him that her father, the plaintiff's testator, would stock the farm for her, with one-third of every thing on his plantation, except negroes, and that he would loan her one-third of his negroes for her life, and at his death, would give her one-half of his negroes, and in that conversation she named no particular negro. The plaintiff then proved, by *W. H. Dunkinson*, that

Matthias, the boy in controversy, was one of the negroes sent by the plaintiff's testator to *Mrs. C's* farm, for the purpose of working said farm. The defendant objected to the admissibility of the testimony of *Col. Coombs*, and the court sustained the objection, and refused to permit the testimony to go to the jury, being of opinion that the same was too light and inconclusive, and had no tendency to establish the facts for which it is offered, no allusion having been made to the negro in controversy, and no circumstance disclosed in the case from which the jury could legitimately infer that *Mrs. C.* admitted that the negro in controversy was one of the negroes of which she spoke, and which were to be loaned to her by her father during life; and especially to contradict the declaration of the plaintiff's testator, as made to *M. C. Jones*, as stated in the first exception. The plaintiff excepted.

3rd Exception. The plaintiff then produced *Mrs. Miles*, formerly *Mrs. C.*, mentioned in the preceding exception as *Mrs. C.*, and proposed to prove by her, that the negro in question belonged to the plaintiff's testator at the time of his death; and insisted, that it appeared from the pleadings in the cause, that he had made a will, and that unless the defendant showed that the proposed witness derived some interest in said negro under said will, she was a competent witness. But on an objection made to her competency by the defendant, the court excluded her. The plaintiff excepted.

4th Exception. The plaintiff, then, to restore the competency of *Mrs. Miles*, exhibited an instrument under seal, executed by her and her husband during the trial, whereby they released their right in said negro to the plaintiff. But the court, on an objection, decided that this instrument did not render *Mrs. Miles* a competent witness. The plaintiff excepted.

5th Exception. The plaintiff then offered said release, and in connection therewith, a copy of the last will of his testator, *Elwiley Smith*, whereby he gives to his daughter, *Caroline E. Miles*, for her sole and separate use, exclusive of any control of her husband, *Thomas H. Miles*, the following negro slaves, now in possession of *Thomas H. Miles*, to wit: *Billy*,

Edward, &c., &c., *Matthias*, &c., &c., for and during the term of her natural life, and after her death to her husband for his life, and thereafter to her children. The plaintiff relied on these papers as removing the objection taken to the competency of *Mrs. Miles*. But the court decided that she was not competent. The plaintiff excepted.

6TH EXCEPTION. The plaintiff then offered another release executed by *Mrs. Miles* alone, whereby she relinquishes all her right to the negro, to the plaintiff. But the court held, this did not remove the objection to her competency. The plaintiff excepted.

7TH EXCEPTION. The plaintiff then offered to prove, by *James L. Foxwell*, that in the fall of 1831, the plaintiff's testator sent several negroes on the farm then occupied by witness, and which *Mrs. C.* occupied the ensuing year, for the purpose of seeding wheat for *Mrs. C.*, and said negroes, after they had finished seeding wheat, were carried back to the farm of the plaintiff's testator, and that *Matthias* was one of those negroes; and that in a conversation between the testator and *Mrs. C.*, the former stated to the latter that he had loaned her negroes to work her farm with, and that *Matthias* was one of the negroes used by *Mrs. C.* in 1832, and afterwards, in working her farm. The defendant objected to the admissibility of this evidence, and the court sustained the objection. The plaintiff excepted.

8TH EXCEPTION. The plaintiff then exhibited a bill of sale executed during the trial by *Mr.* and *Mrs. Miles*, whereby they conveyed and assigned to the plaintiff all their interest in negro *Matthias*, and also the copy of the last will of the plaintiff's testator, before mentioned. But the court still held, that *Mrs. Miles* was not a competent witness. The plaintiff excepted.

9TH EXCEPTION. The plaintiff then offered to read as evidence to the jury, the said last will. But the court held, this was not admissible. The plaintiff excepted.

The cause being then argued before them, the jury rendered a verdict, which was thus entered by the clerk. The said jury

18 [illegible]

upon their oaths do say, as to the first issue within joined, that the said *Thomas W. Morgan* did not take nor detain the said negro, as," &c. "And the said jury do further say, as to the second issue within also joined, that the property of the negro within mentioned, at the within time," &c., "was in the said *Thomas W. Morgan*, as," &c. "And the said jury do further say, as to the third issue also within joined, that the property of the negro within mentioned, at the within time," &c., "was in a stranger, as the said *Thomas W. Morgan* within, by pleading, hath alleged."

The plaintiff then moved in arrest of judgment: 1st. Because there are no sufficient plea filed in the cause. 2nd. Because the jury did not ascertain upon which of the issues they found their verdict. 3rd. Because the jury have found, by their verdict, facts incompatible and inconsistent with each other. 4th. Because the verdict is void for uncertainty and ambiguity. 5th. Because the jury found no facts on which the judgment can be given.

This motion was overruled, and judgment rendered for defendant. The plaintiff appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Martin and Frick, J.

By Pratt and Causin, for the appellant, and
By Thos. S. Alexander, for the appellee.

Spence, J., delivered the opinion of this court.

We think the county court were correct in refusing the plaintiff's first prayer, for the reasons assigned by them. The court erred, in the second exception, by excluding the evidence of *Colonel Coombs* from the jury. Notwithstanding his evidence might not have been competent when isolated and unexplained, yet, when followed up by *Dunkinson's* evidence, which was done before objection was made, it was admissible. This court, in the case of *Smith's Exc'r vs. Garner*, (7 *Gill*, 1,) at December term, 1848, decided that *Mrs. Miles'* declarations

made under similar circumstances, were competent testimony to go to the jury. The court correctly excluded *Mrs. Miles* as a witness in the third exception. She was a distributee of her father's estate, who was plaintiff's testator, and as such distributee, in the absence of a will, would be interested, the will not having been offered in evidence. For the same reason the court properly excluded *Mrs. Miles* as a witness under the 4th exception. She was a distributee, and by the release of her interest in the negro *Matthias*, did not release her entire interest in the estate of her father, and she remained, therefore, interested in the augmentation of his estate. There is no error in the ruling of the court in the 5th exception. The plaintiff, in this exception, with a view to restore the competency of *Mrs. Miles* as a witness, offered in evidence the will of *Elwiley Smith*, in connection with the release of *Thomas H. Miles* and *Caroline E. Miles*, his wife. By the will offered in evidence in this case, the testator gave to his daughter, *Caroline E. Miles*, the negro *Matthias*, (the negro in controversy in this case,) "for her sole and separate use, exclusive of any control of her husband, *Thomas H. Miles*, for and during the term of the natural life of her, the said *Caroline E. Miles*." We forbear to enter upon the examination of the question of a *feme covert's jus disponendi* of her estate, which she holds to her sole and separate use, where the instrument under which she holds, confers no such power in terms. Whether she is to be considered, in courts of equity, as a *feme sole*, with power to dispose, or possessing only such powers as the instrument which confers her title bestows, is a question which, according to our view, in this case it is unnecessary to decide. This was a trial at law, and the question is, whether, at law, the wife alone, or the husband and wife conjointly, can divest the wife's interest in property to which she is entitled to her sole and separate use? We think they cannot; and the release and will did not render *Mrs. Miles* a competent witness. The judgment of the court was correct in the sixth exception, for the reasons assigned on the fifth. The court erred in the seventh exception, by excluding from the jury the evidence of *Foxwell*. The acts and

declarations deposed to by him, were competent and admissible evidence as a part of the *res gesta* of the transaction. The court properly excluded the evidence in the eighth exception, for the reasons stated in our opinion on the fifth exception. The court erred in withholding from the jury the will offered in evidence by the plaintiff, in the ninth exception. The possession and right of property were involved in the issue, the declarations and acts of the plaintiff's testator had been given in evidence to the jury by both parties, and the will was admissible as a declaration, and claim of possession, and property to the negro in dispute, made by the testator in his lifetime.

The court committed no error in overruling the plaintiff's motion in arrest of judgment. The pleadings appear to be in conformity with the forms used and practised under in *Maryland*, from an early period in the history of the practice in this State. *Vide* 2 *Har. Ent.*, 247. In this case the defendant pleaded three pleas. The first, *non cepit*. The second, property in the defendant; and the third, property in a stranger. The plaintiff, in his replication, joined issue on the first plea, and traversed the defendant's second and third pleas by affirming property in himself; upon which traverses issues were joined. *Vide* 6 *H. & J.*, 469, *Cullum vs. Bevans*. The jury found their verdict for the defendant. The form in which it is set out in the record, is a clerical misprison, which, under the act of 1809, ch. 153, is amendable by this court.

The judgment of the county court is affirmed in the first, third, fourth, fifth, sixth and eighth exceptions, and reversed in the second, seventh and ninth exceptions, and *procedendo* awarded.

JUDGMENT REVERSED, AND

PROCEDENDO AWARDED.

Samuel Miller *vs.* The State, use of Henry Fiery.—*December*, 1849.

Declarations of a party, that he signed a bond with the understanding that another person was to be his co-security, made *after* the act of signing, are not admissible in evidence as part of the *res gesta*.

Appeal from *Washington* county court.

The facts of this case will be found in the former appeal reported in 3 *Gill*, 335. The judgment being reversed on that appeal, and a procedendo awarded, the case was again tried, and the same evidence submitted, with the addition of the testimony of *Henry Ankenny* and *Jacob Powles*, of the declarations of *Samuel Miller*, the defendant, in which he stated that he had agreed to become the surety of said *Joseph Fiery*, and that said *Fiery* had represented to him that *Matthew S. Vanlear* was his other surety. To these declarations the plaintiff objected, upon the ground that they were made after his signing of said bond, and delivery thereof to said *Jacob Fiery*, and not at or before the time of such signing. Which objection the court (Buchanan and Marshall, A. J.,) sustained and refused to permit the same to go to the jury. The defendant excepted, and took the present appeal.

The cause was argued before Dorsey, C. J., Magruder, Martin, and Frick, J.

By Wm. Price, for the appellant, and
By J. T. Mason and F. A. Schley, for the appellee.

Martin, J., delivered the opinion of this court.

In this case an action of debt was instituted in *Washington* county court, by the appellee against the appellant, upon the bond of *Joseph Fiery*, *Samuel Miller*, (the defendant,) and *Jacob Fiery*, dated the 3rd of May, 1824, and conditioned for the faithful performance of the duty of guardian, by *Joseph Fiery*, who was the principal obligor.

The appellant appeared to this action, and pleaded *non est factum*. Issue was joined on this plea. The execution of the bond by the appellant, in the month of December, 1823, was proved by the attesting witness. This fact was not, indeed, controverted or denied; but the ground of defence taken by the appellant, under this plea of *non est factum*, was, that he executed this bond under the impression, and with the understanding that a certain *Matthew S. Vanlear* was to be his co-security, and that in legal contemplation the writing in question was not to be considered as his deed, inasmuch as the condition upon which he signed it, had been violated without his consent.

It appears from the record, that at the trial of the cause below, the appellant, for the purpose of showing the circumstances under which he executed this instrument of writing, offered to prove, by *Henry Ankenny*, "that in the month of December, 1823, about the 12th or 15th of the month, the witness was at the house of the appellant, and that the appellant then said, in his family, that he had been at *Joseph Fiery's* that day, and had been prevailed upon by said *Fiery* to become his surety in his guardian's bond, as guardian to his two sons. That *Matthew S. Vanlear* was the other surety in the said bond, and that if he was fool enough to lose one-half of the money belonging to the said wards, he supposed that he would have to lose the other half." And also proposed to prove, by another witness, *Jacob Powles*, that the appellant, in a conversation held with the witness, at some time between the fall of 1823, and the 3rd or 4th of January, 1824, stated, "that *Joseph Fiery* had called on him to become his surety in his guardian's bond, as guardian for his two sons, and he had refused him. That the said *Fiery* complained that strangers would do more for him than his own friends. That he afterwards had agreed to become his surety, and that *Matthew S. Vanlear* was the other surety, and that if *Matthew S. Vanlear* was fool enough to lose seven or eight hundred dollars, he supposed he must do the same. That he felt confident they would have to pay it."

The declarations of the appellant, which we have thus quoted

at large from the record, form the subject of the exception taken in this case; and the single question presented for our consideration is, whether they were admissible in evidence as a part of the *res gesta*?

By recurring to this case as it is reported in 3 *Gill*, 335, it will be seen, that when it was originally tried, the county court instructed the jury, "that if they found, from the testimony in the cause, that the defendant signed and sealed the bond in controversy, under the impression, and the understanding that *Matthew S. Vanlear* was to be the co-surety, that, thereby, the said bond was not the deed of the defendant." This instruction was reversed in the appellate court, upon the ground, as stated in their opinion, that there was no evidence from which the jury could find that the bond upon which the suit was brought, was signed and sealed by the defendant, under the impression and with the understanding that *Matthew S. Vanlear* was to be his co-security. The Court of Appeals, however, refrained from the expression of any opinion with respect to the legal proposition enunciated by the county court, as it was not called for by the exigencies of the case; and it is perfectly apparent, that at the second trial of this cause, the declarations of the appellant were proposed to be introduced for the purpose of explaining the intention and design with which he signed and sealed the bond in controversy, and that, although the paper appears upon its face to have been absolutely executed, it was in fact, executed by him upon a condition that had not been performed.

It is, then, obvious that the signing and sealing of this instrument of writing, by the appellant, in December 1823, was the *act* intended to be explained and qualified by his declarations. And assuming this to have been the aim and purpose of the testimony, an insuperable objection to the admissibility of those declarations in evidence, as a part of the *res gesta*, is, that they were made posterior to the signing and sealing of the instrument in question; that they constituted no part of the transaction they were intended to illustrate; and were merely the narration of a past occurrence, in which the appellant re-

lated the circumstances under which he was induced to place his name upon the bond.

In defining the rule with respect to the admissibility of declarations in evidence, as a part of the *res gesta*, the supreme court of *Connecticut*, in *Enos vs. Tuttle*, 3 *Conn.*, 250, said: "The declarations, to be a part of the *res gesta*, must have been made at the time of the act they are supposed to characterise, and well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonise with them as to constitute one transaction."

In the case of *Kolb vs. Whitely*, 3 *Gill & John.*, 196, the Court of Appeals said: "The rule is well settled, that where the expressions heard constitute a part of the transaction, they are admitted to show its character, or the speaker's intention. * * * Hearsay is often admitted in evidence as part of the *res gesta*, the meaning of which seems to be, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible evidence for the purpose of showing its true character." This rule of evidence is recognised in the cases of *Cross vs. Black*, 9 *Gill & John.*, 198, and *Miles vs. Knott*, 12 *Gill & John.*, 454, and will be found to be very clearly stated and illustrated by *Mr. Evans*, in his notes to the second volume of *Pothier on Obligations*.

We think, therefore, that the county court were correct in ruling these declarations to have been inadmissible. We forbear to express any opinion with respect to the legal effect of those declarations upon the obligation of the appellant, if they had been admissible in evidence, as the question is not before us upon the record, and anything we might say upon this subject, would not carry with it the force of an authoritative decision.

JUDGMENT AFFIRMED.

Samuel Miller *vs.* The State, use of Lewis Fiery.—*December*, 1849.

The act of 1845, ch. 358, requiring *Washington* county court to grant an appeal in this case, and to set out and embody in the record, certain exceptions and points of law decided in a previous cause in said court resembling this, is unconstitutional and void, as the exercise of judicial powers by the Legislature

Appeal from *Washington* county court.

It appears from affidavits contained in the record in this case, that two suits were instituted at the same time, against the same defendant, (the present appellant,) upon the same guardian's bond. One in the name of the State, for the use of *Henry Fiery*, which is reported in 3 *Gill*, 335, and *ante p.* 141, the other for the use of *Lewis Fiery*, (the present case.) Both cases were tried at November term, 1843, of *Washington* county court. *Henry's* case was tried first, and certain questions of law decided against the plaintiff, to which exceptions were taken at the time. Immediately after the jury retired in *Henry's* case, that of *Lewis'* was taken up, and the same questions of law decided by the court, but no exceptions were taken by his counsel, they being under the impression that no objections would be made to the taking of such exceptions when the cause was finally decided; in other words, that the one case should abide the result of the other. In the case of *Lewis*, the jury returned with a verdict for the defendant, and a motion for a new trial was immediately made. In *Henry's* case, the jury were unable to agree, and were discharged. The causes were then continued for several terms; *Henry's* as it originally stood on the docket, and *Lewis'* under motion for a new trial. At November term, 1844, *Henry's* case was again tried, and the same points arose, and were decided as before, and exceptions taken by the plaintiff. The jury rendered a verdict for the defendant, and the court, at the same term, overruled the motion for a new trial in the case of *Lewis*. The bills of exceptions were then drawn up and signed in *Henry's*

case, and upon application to have similar exceptions signed in *Lewis*' case, the defendant's counsel objected, and the court refused to interfere. The plaintiff then applied to the Legislature, and the act of 1845, ch. 358, was passed for his relief. This act is recited, verbatim, in the opinion of the court in this case. In pursuance of this act, the record was made up, and the same exceptions signed as reported in *Henry's* case, in 3 *Gill*, 335. The case of *Henry* having, in the meantime, been reversed by the Court of Appeals, and sent back under a procedendo, it was agreed to reinstate the case of *Lewis* upon the docket, so that the new points to be raised and decided upon the trial of *Henry's* case, under the procedendo, might also be raised in this. It was further agreed, that if the signing and sealing of the bills of exceptions, above referred to, should be deemed void by the Court of Appeals, in consequence of the unconstitutionality of the act of 1845, this appeal should be dismissed, otherwise to be heard and determined upon the questions of law to be raised and decided in the trial of *Henry's* case, the result of which this case is, in that event, to abide.

The cause was argued before Dorsey, C. J., Magruder, and Frick, J.

By Wm. Price, for the appellant, who insisted:

That the act of 1845, was an assumption by the Legislature of judicial powers, and, therefore, unconstitutional and void.

By John Thompson Mason, for the appellee:

The question involved in this appeal is, the constitutionality of the act of Assembly of 1845, ch. 358. It is a conceded point, that an act of the Legislature, directing a court to grant a new trial, is not repugnant to the constitution. In addition to the other views presented in the argument of this cause, it is contended, that the effect of the present act of Assembly was but to require *Washington* county court to grant a new trial. The act required that the bills of exceptions, which had been previously prepared and sealed by this court, in the case of

Henry Fiery and Samuel Miller, should be incorporated in the case of *Lewis Fiery*, the case now under consideration. It is contended, by the defendant's counsel, that the bills of exceptions in question, might contain points or questions which did not arise in this cause, or might have omitted points and questions that did arise, and that in that way the Legislature had arrogated to itself judicial powers. For the sake of argument, admit that the two cases are not alike, and that the bills of exceptions in the case of *Henry Fiery*, may contain questions which did not, in fact, arise in the case of *Lewis Fiery*, or, on the other hand, may have omitted questions which did arise. The bills of exceptions, as presented to the Court of Appeals, in the case of *Henry Fiery*, made such a case as required the court to send back the case to the county court upon procedendo. The same bills of exceptions afterwards arising in the case of *Lewis Fiery*, under the act of Assembly, would, of course, be decided as they had before been, and this case, like the case of *Henry Fiery*, would have been sent back under a procedendo.

In the first place, we will suppose that the court, in acting upon the bills of exceptions which had been submitted to them under the act of Assembly, had decided questions which, in fact, never had arisen, and which were, in truth, no part of this case. How could such a circumstance affect the case in the trial below, under the procedendo? If the questions which the Court of Appeals had decided, did not arise in the subsequent trial of the cause, then, as a consequence, the law, as laid down by the court, had no application to the case, and were mere abstractions, in no way affecting the rights of the parties to the cause. If a state of facts, however, did arise, as contemplated, rendering this case similar to the one of *Henry Fiery*, the law was at hand to fit the case

On the other hand, if there were other questions which did arise in the case of *Lewis Fiery*, which are not embraced in the bills of exceptions, and were, therefore, not decided by the Court of Appeals, what is there to prevent the defendant from raising those questions anew upon the trial, under the proce-

dendo? He is only bound by the law of the other case, so far as the same applies to this case, and no new and dissimilar questions can be determined by the law of the former case.

The case, then, reduces itself to this condition of things: If the questions in the case of *Lewis Fiery* are the same with those which had been previously decided by the Court of Appeals, in the case of *Henry Fiery*, then the defendant cannot complain that the case should be determined as the former case had been, for the decision in the former case had become the law of the land, and was not only to govern the case of *Lewis Fiery*, but was to govern all subsequent similar cases. If, on the other hand, the cases should be found dissimilar, the law of the former case determined nothing as to the law of the latter; in other words, whenever the latter case differed from the former, it was a new case, and was to be decided upon different principles of law. The *effect* of the act of Assembly, therefore, was but to grant a new trial to *Lewis Fiery*, which it was conceded the Legislature had a right to do.

Dorsey, C. J., delivered the opinion of this court.

Whilst entirely concurring in the well established principle of law, that the judicial tribunals of this State ought never to declare an enactment of its Legislature unconstitutional and void, unless it plainly appears that the Legislature has transcended its constitutional powers, we think it manifest that the act of 1845, ch. 358, is the exercise of such an unconstitutional power, by the General Assembly of *Maryland*, as renders it wholly inoperative and void. As decided by this court in the case of *Crane vs. Meginnis*, the legislative and judicial powers, under the constitution of this State, are confided to different branches of the government; the Legislature are incompetent to exercise judicial powers. The only question, then, which this case presents, is: did the General Assembly, in passing the act of 1845, ch. 358, assume the exercise of judicial powers? In perusing that law, it is impossible not to see that it has done so. By the act it is provided, "that the court of *Washington* county be and the same is hereby autho-

rised and required to grant an appeal in the case heretofore decided by said court, wherein the State of *Maryland*, use of *Lewis Fiery* was plaintiff, and a certain *Samuel Miller* was defendant; and that the points of law decided, and the instructions given by the said court, as set forth and contained in an appeal already granted by said court, wherein the said State of *Maryland*, use of *Henry Fiery*, was plaintiff, and the said *Samuel Miller* defendant, and in every way similar to the case first herein mentioned, be set forth and embodied in the record of the appeal herein provided for; *provided, nevertheless*, that the said court shall be satisfied that the plaintiff aforesaid lost his right to appeal in the above case at the proper and regular time for taking the same, by a misunderstanding of the counsel engaged in the case, in regard to the taking of the said appeal." In respect to this proviso, there could be no doubt; the power which is conferred, was one which might have been exercised by the county court. This was the only uncontrolled power which the court was authorised to assume. Every thing else that the court was required to do, under this act of Assembly, was to be done in obedience to the positive mandate of the Legislature. The court were required not to certify, truly, its judicial proceedings in a case which had been tried before it, and from their decision of which, a legislative appeal was provided; but, in effect, to certify contrary to the fact, that certain bills of exceptions, taken twelve months afterwards, in a different cause, were bills of exceptions taken in the cause in which the court was required to interpolate them. An implicit obedience to this legislative mandate, was imposed upon the court, even though it might be satisfied of its own knowledge, that not a particle, either of the law or facts contained in the bill of exceptions, ever transpired in the trial of the case, in which it was required to insert them as a part of its proceedings. Bills of exceptions are the certificates of the judicial proceedings, the adjudications, of the court, and the Legislature has no more power, by a retrospective law, to require the court to insert in the record of its proceedings, bills of exceptions never taken in the trial of the causes, than it has a *priori* to order the court to

enter any specified judgment in a cause pending before it for trial, or to certify in the transcript of the record of a cause, which had been adjudicated by it, a judgment the reverse of that which had been rendered. That the act before us is unconstitutional and void, as the exercise of judicial powers by the General Assembly of *Maryland*, it is deemed unnecessary to refer to any other of the numerous authorities cited in the argument, than that of *Crane vs. Meginnis*, 1 *Gill & John.*, 463.

The agreement of the counsel in the cause, requires nothing more of this court than the expression of its opinion on the constitutionality of the act of Assembly.

APPEAL DISMISSED.

JOHN SWANN, CHARLES S. SWANN, AND ROBERT SWANN, BY JOHN SWANN, THEIR NEXT FRIEND, *vs.* THE MAYOR AND COMMON COUNCILMEN OF THE TOWN OF CUMBERLAND.—*December*, 1849.

The mayor and common councilmen of the town of *Cumberland*, passed an ordinance, under the act of 1815, ch. 136, to grade, &c., *Washington* street in said town, upon the petition of the owners of two-thirds of the property lying upon a *part*, only, of said street. HELD:

That under this act said corporation might pass an ordinance to improve a particular part of a street, upon application of the owners of two-thirds of the property situated on that part, but can order the *whole* street to be improved only upon application of two-thirds of the property owners on the whole street.

In all cases of special limited jurisdiction, the proceedings must conform strictly to the authority conferred.

An appeal is given by our statute law in any civil case in which a writ of error will lie.

As a general rule, an appeal will lie in any civil case where the court below proceeds, under its usual and general jurisdiction.

Where a special jurisdiction is given to the county court, to be exercised in a peculiar mode, and not to be proceeded in according to the course of the

common law, or where an appeal is given to it from some inferior tribunal, an appeal does not lie.

In this case the county court brought the proceedings of the mayor and common councilmen before it, by a writ of *certiorari*. HELD: that in so doing, it acted in virtue of its ordinary jurisdiction, and an appeal lies from its judgment upon the writ.

The process of *certiorari*, is the appropriate mode by which superior courts examine into the authority of an inferior tribunal, and ascertain whether it has transcended the special powers to which it is limited by law.

Appeal from *Allegany* county court.

Upon the petition of the appellants, a *certiorari* was issued from said court, directed to the mayor and councilmen of the town of *Cumberland*, commanding them to return a certain warrant issued by them, directed to the bailiff of said town, and levied upon the property of the petitioners, and all the papers and proceedings relating thereto.

The return of this writ sets forth the 9th section of the act of 1815, ch. 136, entitled, "an act to provide for the appointment of commissioners for the regulation and improvement of the town of *Cumberland*, in *Allegany* county, and to incorporate the same," as follows: 9. "*And be it enacted*, that the said commissioners shall have power, when requested in writing by the owners of two-thirds of the property on any street or alley, or parts thereof, in said town, to cause the same to be graded, paved, or otherwise improved, as the case may be, if, in their discretion, they shall think fit so to do, and to levy the expense thereof on the property binding on said street or alley, agreeable to the extent of said lots on the said street or alley, and to collect the expense of grading, paving or otherwise improving the same, in the same manner and on the same conditions as shall hereafter be prescribed by this act, for collection of the tax in said town." The 10th section provides for the collection of assessments made in virtue of this act, by warrants issued to the bailiff of said town, in the nature of a *fieri facias*. The return further states, that by virtue of the powers conferred by this act, upon the petition in writing of "two-thirds of the property owners on *Washington* street, from *Wills'* creek bridge to *Spruce* alley," the said mayor and councilmen passed an

ordinance, exhibited with the return, the title of which is, "To grade, set curb stones, and pave *Washington* street, on the west side of *Wills*' creek, in the town of *Cumberland;*" and which recites: "Whereas the owners of two-thirds of the property on *Washington* street, (commencing at *Wills*' creek bridge, and terminating with the property of the heirs of *Robert Swann*, deceased,) in the town of *Cumberland*, have petitioned in writing," &c., and enacts that *Washington* street shall be graded. That said mayor and councilmen proceeded to assess and levy the expenses of improving said street upon said property holders, and issued a warrant to the bailiff of said town, in conformity with the provisions of said act, which was duly levied upon the property of the appellants. A plat of said *Washington* street was exhibited with this return, showing that said street extended from *Wills*' creek bridge two squares beyond *Spruce* alley. The court dismissed the petition and writ, and gave judgment for costs against the petitioners, who appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Magruder, and Frick, J.

By Perry and Semmes, for the appellants, and
By McKaig, for the appellees.

Chambers, J., delivered the opinion of this court.

The return to the *certiorari*, to which alone we must look for the facts on which the questions depend, which are involved in this case, sets out the act of Assembly of 1815, ch. 136, the petition and proceedings before the mayor and council, the ordinance professing to execute the authority given by the act of Assembly, and the warrant in nature of an execution against the appellants.

The act of 1815, ch. 136, authorises the mayor and council to improve the streets, or parts thereof, on application of the owners of two-thirds of the property thereon, and to collect from each owner, by a warrant in nature of a *fieri facias*, his

proportion of the expense. A plat is returned, and referred to in the proceedings as proof of the location of *Washington* street, and the number of owners, and the extent of their possessions, by which plat it appears that the said street, commencing at the *Wills* creek bridge, runs too squares beyond *Spruce* alley.

The return also sets out the petition, which asks for the improvement of *Washington* street, from the bridge over *Wills* creek to *Spruce* alley, and also the names of the subscribers thereto, and the calculations and estimates showing by what *data* they regulated their proceedings, and proving, what was not denied in the argument, that in estimating the proportion of property holders, reference was had to those only on that part of *Washington* street extending to *Spruce* alley, and not the whole length of the street, as described on the plat, and that the owners of two-thirds of the property on the whole street did not apply for the improvement.

The ordinance, which is also set out at large, is entitled, "an ordinance to grade," &c., "*Washington* street, on the west side of *Wills* creek;" and the enacting clause provides, "that *Washington* street shall be graded." It is alleged in the recital, that "the owners of two-thirds of the property on *Washington* street, (commencing at *Wills* creek bridge, and terminating with the property of the heirs of *Robert Swann*, deceased,) have petitioned," &c., and no allusion or reference is elsewhere made in the ordinance to a part only of the street. It is manifest, therefore, on the face of the proceedings, that an ordinance has been passed for the improvement of *Washington* street, west of the bridge, on the application of persons professing to be owners of two-thirds of the property on a *part* of it, and without the application or assent of the owners of two-thirds of the property on the whole line of the street directed to be improved.

We think the objection to this proceeding is fatal. The act of 1815, in terms requires, as a prerequisite to the exercise of the authority conferred upon the corporation, the assent of the owners of two-thirds of the property on the whole line of the

street or alley to be improved. If a *part* only, is to be improved, the act enables the corporation to gratify an application made for that object by the owners of two-thirds of the property lying on that part, by an ordinance directing that particular part of the street to be improved. They can only order the whole street to be improved by an application from two-thirds of the property owners on the whole street. The city authorities have no power in this respect, but in virtue of the act of Assembly, and their proceedings, as in all other cases of a special limited jurisdiction, must conform strictly to the authority conferred on them.

The ordinance, therefore, was not authorised, and could confer no power on the commissioners to improve the street, or upon the bailiff to collect the sum claimed from the appellants as their proportion of the expenses.

In this view of the case, it is unnecessary to decide the question which was discussed, as to the authority of the commissioners of the county to express their assent as owners of the public property situate on said street—the court house and the jail.

In any event, the amount of property represented by the petitioners, would be less than two-thirds of all on the whole street; and, therefore, whether the commissioners are to be regarded as owners within the view of the act of 1815, or not, would not affect the result.

The question, whether or not this appeal would lie, was disposed of in the preliminary stage of the argument. An appeal is given by our statute law, in any civil case in which a writ of error will lie. As a general rule, an appeal will lie in any civil case where the court below proceeds under its usual and general jurisdiction.

It would be otherwise in a case where a special jurisdiction was to be given to the county court, to be exercised in a peculiar mode, and not to be proceeded in according to the course of the common law, or where an appeal is given to it from some inferior tribunal.

In this instance, the court below acted in virtue of its ordi-

nary jurisdiction, well known as a matter of common practice as well in the courts of this State as in the king's bench in *England*. The process by *certiorari*, is the appropriate and well known mode by which the superior courts examine into the authority of an inferior tribunal, and ascertain whether it has transcended the special powers to which it is limited by law. Whether any error is to be found in the proceeding of the county court, in the exercise of such, its ordinary jurisdiction is clearly a proper subject of enquiry on appeal.

We, therefore, direct the judgment of the county court to be reversed, and the proceedings of the mayor and councilmen of the town of *Cumberland* to be quashed, for want of jurisdiction.

JUDGMENT REVERSED.

JOSHUA JOHNSON *vs.* THOMAS J. EVANS.—*December*, 1849.

A father, in behalf of his son, then a minor, made a conditional bargain with defendant for the purchase of certain lands, subject to the assent of his son, when he attained age, and under this contract advanced to defendant large sums of money for the use of his son, and which, at the time the several advances were made, he intended to give his son. On attaining age, the son refused his assent to this contract. HELD:

That in contemplation of law, the money so advanced belonged to the son, and that he could recover it back from the defendant in an action for money had and received.

It is no objection to such recovery, that the contract for the purchase of lands was by parol, and, therefore, void under the statute of frauds.

When the contract is wholly rescinded, either by mutual consent of the parties, or by virtue of a clause contained therein, the common count lies to recover money paid under the agreement.

If this purchase was intended as an advancement in land to the son, subject to the provision that, on attaining age, he might affirm the purchase, or annul it, and treat the advances so made as a debt, then, as the money was only to be the debt of the son, by an election, which could not be made

under a void contract, it was, in legal contemplation, the money of the father, and the son could not recover it.

Where an instruction excepted to, would not enable the plaintiff to recover more than the verdict would otherwise give him, this court will not reverse the judgment, on account of its being granted.

The plea of limitations is no bar, where it is proved that the defendant, within three years of the commencement of the action, acknowledged the existence of the debt, without any refusal to pay, or excuse for not paying it.

Appeal from *Allegany* county court.

This was an action of *assumpsit* brought by the appellee against the appellant. The declaration contains the general *indebitatus assumpsit*, and money counts. Pleas, *non assumpsit* and limitations, in the two usual forms.

1st Exception. At the trial, the plaintiff offered the testimony of *Hugh W. Evans*, taken and read by consent. Witness is the father of the plaintiff, who came of age in February 1841. In 1839, witness made with the defendant (*Johnson*,) a contingent arrangement on behalf of his son, the plaintiff, for the purchase of certain lands in *Allegany* county, which was to be ratified or annulled by plaintiff at his discretion, on attaining majority. In pursuance of this arrangement, witness advanced to *Johnson* large sums of money, at various times, between the 27th of July, 1839, and the 17th of May, 1840, amounting to $6,397.14, including interest. That these advances were on account of the plaintiff, and that it was distinctly agreed and understood between *Johnson* and witness, that the former was to pay back the money, with interest, to plaintiff, in case he should decline the arrangement on attaining his majority, and that *Johnson* was to have a reasonable time in which to make such re-payment. That plaintiff, shortly after attaining age, declined to carry out this arrangement, and gave notice thereof to defendant in the presence of witness, early in March, 1841. No agreement in writing was ever entered into between the parties. Witness took the benefit of the insolvent laws in May 1843; but at the time he made these advances to defendant, he considered himself worth at least $120,000, over and above all his liabilities. Witness further proved, that in a conversation held with defendant, in August

1845, the latter said he would prefer to secure the debt due the plaintiff, by will, to which witness replied, that that was not the understanding, and that he did not believe plaintiff would accede to such an arrangement. That defendant acknowledged having received these advances on account of the plaintiff, and said nothing which would induce witness to believe that he intended or proposed to evade payment of the debt. The plaintiff further proved, by *H. T. Evans*, that witness was present at a conversation between the plaintiff and defendant, in reference to this matter, in November or December, 1845, when the latter proposed to liquidate this claim by giving the plaintiff land at a price. There was no other account than this between the parties.

The defendant then proved, by *Jacob Angell*, that some 7 or 8 years ago, *H. W. Evans* and defendant came to witness' house, where a conversation occurred about the land of the latter, in *Allegany*—the large tract; that *Mr. E.* was to give defendant $45,000 for one-half of that tract, and to pay him, as the latter wanted it, for re-building his mill, which had been burned. Plaintiff was not present. He understood that defendant was to draw the money as he wanted it, and the sums so advanced, were to be so much on the purchase. The defendant further proved, by *Thomas Hammond*, that witness is acquainted with the lands of the defendant in *Allegany*. The large tract contains fourteen thousand eight hundred acres, and that, in 1839, $45,000 was not, in witness' opinion, a high price for one-half thereof.

The defendant then prayed the court to instruct the jury, that if they find that the agreement, as proved by the plaintiff, related to the sale of lands, or some interest in or concerning the same, and was not in writing, then said agreement is void under the statute of frauds, and the plaintiff is not entitled to recover, because his right so to do, is founded upon the validity of such agreement. Which direction the court (MARTIN, C. J., and MARSHALL and WESTELL, A. J.,) refused to give, but instructed the jury:

1st. If they find that there was a parol contract between *H.*

W. Evans and defendant, for the purchase of the land mentioned, and that this purchase was intended as an advancement in land for the plaintiff, with the provision, that plaintiff might, when he attained age, elect to affirm the purchase, or annul it, and treat the advances so made as a debt, and that the payments so made to defendant, were made with the money of *H. W. Evans*, in pursuance of this contract, then, as the money so advanced was only to be considered as the debt of the plaintiff by an election, which could not be made under a void contract, it was, in legal contemplation, the money of *H. W. Evans*, and the plaintiff is not entitled to recover.

2nd. But if they find, that the money with which *H. W. Evans* made the several payments to defendant, on the parol contract stated in the testimony, was money which he had given to his son, or intended to give to him, at the time the respective payments were made, and that the said payments were made for the use of the plaintiff, then, in contemplation of law, the money in controversy belongs to the plaintiff, and he is entitled to recover.

To which refusal, and to the granting of the 2nd instruction by the court, defendant excepted.

2ND EXCEPTION. The plaintiff then offered this prayer, "that if the jury find, that at the time the said *Hugh W. Evans* paid the money to and for the use of the plaintiff, he intended it as an absolute gift, and that it was not, in any event, to be repaid, or to come back to said *Evans*, but was to be the plaintiff's, then the plaintiff is entitled to recover whatever sum the jury shall believe was so paid for him; provided they also believe, that defendant acknowledged the existence of said debt as due to the plaintiff at any time within three years before the commencement of this suit." Which was granted, and defendant excepted.

3RD EXCEPTION. The plaintiff then offered his 2nd prayer, that if the jury find, that defendant, within three years before the commencement of this action, acknowledged the existence of the debt as due from him to the plaintiff, without any refusal to pay, or excuse for the non-payment thereof, the statute

of limitations is not a bar to a recovery in this case; which was granted. The defendant excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, and Magruder, J.

By Price, and Perry, for the appellant, and
By McKaig, for the appellee.

Magruder, J., delivered the opinion of this court.

The declaration in this case contained the several money counts. A verdict was rendered for the appellee, and of this verdict the appellant cannot complain, unless he can show that it was, or might have been the result of erroneous instructions given by the court to the jury, in the course of the trial.

There was evidence tending to prove that the appellant did receive money as the money of the appellee, and the former had to prove that it became his money in consequence of some valid contract made by a person authorised to dispose of it, and to vest the title to it in him.

The appellant insists, that the appellee cannot recover in this case, because, according to the proof, the money was received by him (the appellant,) under an agreement for the sale of land, which, not being in writing, is void by the statute of frauds. No doubt the contract in relation to the land, could not be enforced, especially at law, not merely because it was not in writing, but also because, by the terms of it, the appellant was to remain the owner of the land, if the appellee, when he came of age, refused to purchase (to make a valid contract for) it.

According to the proof, no purchase was made by the appellee, and he cannot now claim the land. It is immaterial, then, whether the contract was in writing or not. It was not understood to be a contract actually made, and not to be altered, but with the consent of both parties, but, as a witness states, it was a contingent arrangement, to be binding on the

parties, if the appellee afterwards assented to it. It was certainly no part of that arrangement, that the appellant should retain the money which he then received, whether he parted with his land or not. To the contract thus made for him, the appellee refused to assent. To whom does the money received under such arrangement or understanding belong?

The contingent arrangement is now not to take effect; upon what principle, then, can the appellant claim a right any longer to withhold the money? "When the contract is wholly rescinded, either by the mutual consent of the parties, or by virtue of a clause contained therein, the common count lies to recover money paid under the agreement." *Chitty on Contracts*, 624. See, also, 1 *Henry Blackstone*, 65. *Cowper*, 197.

If the appellant is to retain his land, surely he is not to retain money which he received, because it was to be a payment of so much of the purchase money, provided the owner of the money afterwards consented to be the purchaser of the lands. The money is in the hands of the appellant; yet it is not to be his money, unless it becomes a part of the purchase money to be paid for land when purchased (by a valid contract, of course,) by the appellee, from the appellant. It is money received by the latter for the former, if it be not a payment, and it is not to be a payment unless a valid sale of the land afterwards takes place.

What has been said, is sufficient to show that the court did not err in refusing to instruct the jury, that if they believed that the agreement, as proved by the plaintiff, (appellee,) related to the sale of lands, and was not in writing, the same was void, by the statute of frauds, *and the plaintiff is not entitled to recover.*

To the first instruction, which the court, according to the record, gave to the jury, the appellant cannot object.

The second instruction required the jury to find, from the testimony, that the money with which the witness *(H. W. Evans,)* made the several payments to the appellant, on the parol contract, was money which he had given to his son, or

intended to give to him, at the time when the payments were made, and that said payments were made for the use of the plaintiff, (appellee;) and if they were so satisfied, then the money in controversy belonged to the plaintiff, and he was entitled to recover.

This case may be regarded, and, in fact, is a contract made, or attempted to be made, by one person for another, its validity to depend upon the subsequent assent of the latter. The money received by the intended vendor, whether it was obtained by loan or gift, the jury was authorised, by proof in the case, to consider as the money of the appellee, to be recovered back by him, if the contract was not ratified.

In deciding any of the questions which this record brings before us, we are not to enquire, what were the circumstances of the father of the appellee, at the time when any of the money claimed in this suit was received by the appellant. Whether he could afford to give so much money to any one of his children, is a question which does not belong to this case.

Another prayer, so far as it asked the court to say to the jury, that the money was the money of the appellee, if the facts therein stated were proved to the satisfaction of the jury, is correct. In this prayer, however, it is insisted, that the court was asked to assume, and in granting the prayer did assume, that *H. W. Evans* paid the money to and for the use of the said *T. J. Evans*. This, it must be granted, was telling the jury that some money was paid by the former for the latter. But, could this prejudice the defendant in the court below? The jury were to find when the money was received by the appellant, the amount received, and *quo animo* he received it, and without proof, which satisfied them, that the sums of money received by the appellant, for the appellee, were sufficient to sustain the jurisdiction of the court, a verdict for the plaintiff would, in effect, have been a verdict for the defendant. In the case of the *Turnpike Company vs. Barnes*, (6 *H. & J.*, 57,) the verdict was (in consequence of a misdirection by the court,) for the defendant, when it ought to have been for the plaintiff, but for a sum less than $50, and, of

course, the plaintiff would have been non-suited. The court, for this reason, affirmed the judgment. In this case, it is obvious that the words of the instruction, to which an exception is taken, do not enable the plaintiff to recover one cent more than the verdict would otherwise have given him. There was nothing in the exceptionable words which could mislead the jury.

There is no error in the last instruction. The plea of limitations could be no bar to a recovery, if the jury were satisfied, that within three years before the commencement of the action, the defendant acknowledged the existence of the debt, without any refusal to pay, or excuse for not paying it.

Upon an examination of the record in this case, we do not discover any ground for a reversal of this judgment.

JUDGMENT AFFIRMED.

DORSEY, C. J., dissented.

WILLIAM YOUNG, *vs.* JAMES LYONS, WINDHAM ROBERTSON, AND OTHERS.—*December*, 1849.

Where there are several sureties, and any of them become insolvent, those who pay the whole debt, can compel contribution, in equity, from the remaining solvent sureties, towards the entire debt paid.

Where the relief sought is common to all the plaintiffs, and constitutes but one subject matter of complaint against the defendant, the objection of multifariousness will not hold.

Five sureties in a bond of $50,000, paid the entire debt, each contributing the sum of $10,000, and then filed a joint bill in equity against another co-surety, for contribution. HELD: that the objection of multifariousness to such a bill, could not be sustained.

All parties, obligors and obligees, are required to be made parties to the suit; but an exception to this rule is, that if either of the obligors, principal or surety is insolvent, he need not be made a party.

The allegation that four co-sureties were insolvent, and unable to pay *at the time the bond become due*, is not a sufficient excuse for not making them

parties to a bill filed nearly five years afterwards, and the omission to allege insolvency at the time of filing the bill, is fatal on demurrer.

The fact of insolvency, at a particular time, being admitted, does not negative the conclusion, that the parties may have become solvent four years afterwards.

The allegation, that a party "was utterly insolvent and unable to pay the bond, or any part thereof to the obligee, or his executor, but, on the contrary, previous to the maturity of the bond, had become *utterly and hopelessly* insolvent, and that he was dead at the time of filing the bill," is a sufficient excuse, upon demurrer, for the omission to make him or his personal representative, a party to the proceedings.

A demurrer admits the truth of the facts stated in the bill, but does not admit the conclusions of law drawn from them, although they are alleged in the bill. It is not necessary to state facts by positive averment, if the terms be reasonably certain in their import, they are admitted by the demurrer.

Appeal from the equity side of *Washington* county court.

The appellees, five in number, together with the appellant and four others, became sureties of *John Heth*, in the following bond:

"Whereas, the late *Beverly Randolph* had agreed with *John Heth* to sell to him five hundred shares of the *Black Heath Company of Colliers*, for the sum of $50,000; and whereas, it hath become necessary for the said *Heth* to obtain the possession and control of said stock, with full and complete authority to sell and transfer the same, and to prevail with *Charles H. Randolph*, executor of *Beverly Randolph*, to transfer and set over to him, the said *Heth*, the stock aforesaid, he, the said *John Heth*, doth hereby undertake, on his part, and the undersigned do also undertake on their parts, for the said *Heth*, as his sureties, that if the said *Charles H. Randolph*, executor of *Beverly Randolph*, shall and will transfer and set over to the said *Heth* the stock aforesaid, that he, the said *Heth*, shall and will, on or before the first day of January, 1841, reconvey the whole of the said stock to him, the said *Charles H. Randolph*, executor aforesaid, or that the said *Heth* shall and will, on or before the said first day of January, 1841, pay, or cause to be paid to the said *Charles H. Randolph*, the sum of $50,000, being the purchase money of the said stock. In witness whereof, the said *John Heth*, and the other parties to these presents,

have hereunto set their hands and seals, this 26th day of November, 1839."

Heth having failed to comply with the condition of the bond, the appellees paid the whole amount thereof, with interest, and on the 23rd of August, 1845, filed their bill in equity against the appellant, one of their co-sureties, for contribution. The allegations of this bill are sufficiently stated in the opinion of this court. The defendant demurred, on the grounds: 1st. That the complainants had remedy at law. 2nd. That the principal obligor, and the four other co-securities, should have been made parties. And 3rd. That the bill is multifarious, in blending in one suit several separate and distinct rights, which are proper to be enforced by separate and several suits. The court (MARTIN, C. J.,) overruled this demurrer, and the defendant appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, MAGRUDER, and FRICK, J.

By WM. SCHLEY, for the appellant, and
By MCKAIG, for the appellees.

FRICK, J., delivered the opinion of this court.

The present complainants, with *five* others, became the sureties of *John Heth*, in a bond for the sum of $50,000, in which "they undertake on their parts, as sureties for said *Heth*, that on the failure on his part to perform the stipulations of the bond, he shall, on or before the 1st day of January, 1841, pay to the obligee the said sum of $50,000." The bill states, that when the bond became due, and upon his failure to comply with its stipulations, the said *John Heth* was utterly insolvent, and unable to pay the $50,000, or any part thereof; that before the maturity of the bond, he had become utterly and hopelessly insolvent, and unable to pay the said sum to *Charles H. Randolph*, (the obligee,) in his lifetime, or to his executor, after his death; and that the said *John Heth*, a citizen of the State of *Virginia*, is now deceased. The bill further states.

that *at the time the bond became due* and payable, *four* of the other co-sureties in the bond were also insolvent, and unable to pay any part or portion of the said sum, or to contribute thereto, and that they, the complainants, have been compelled, and have paid the whole of said sum of $50,000, each having paid one-fifth of the whole sum, with interest, and they now claim that the defendant (as the only other solvent security,) may be adjudged to pay to them the one-sixth part of the said $50,000, or to each of them one-fifth of the said one-sixth part of the whole sum, with interest.

To this bill the defendant demurs, and for cause of demurrer alleges: 1st. That the bill is multifarious in this, that five several and distinct causes of action are blended in one suit; and 2nd. That the bill is defective, for want of parties, inasmuch as the personal representative of the principal debtor and the four co-sureties named in the bill, ought to have been parties to the suit, and there is no sufficient reason set forth in the bill, for the omission to make them parties thereto.

It is not contended here, that these complainants have no relief in equity, but that in analogy to their rights at law, where a *joint* action could not be maintained, in chancery, also, a separate bill must be filed by each of them, for his separate *quota* of contribution. This is not a necessary consequence, for the jurisdiction in chancery is less restricted than at common law; and, for that reason, in cases like the present, for contribution, is the proper resort upon a *joint* bill. At law, the plaintiff could recover no more than an aliquot part of the amount paid by him, reference being had to the number of sureties, and, according to this doctrine, neither of the parties here could recover more than one-tenth, even where it is admitted that other of the co-sureties are insolvent. *Cowell vs. Edwards*, 2 *Bos. & Pul.*, 268. It is true, that more recently it has been decided, "that if one of several sureties be insolvent, contribution at law, as well as in equity, will be according to the number of those who are solvent." 2 *Bailey*, 397, 401. 11 *New Hamp.*, 432, 440. But, without stopping to inquire which of these authorities would avail in our courts,

it is enough to say, that in either case, it could only be made available by *separate actions* at law. In equity, however, it is established, and uncontroverted, that where there are several sureties, and any of them become insolvent, those who pay the whole debt can compel contribution from the remaining solvent sureties towards the entire debt paid. 1 *Ch. Rep.*, 34. See, also, *Byers vs. McClanahan*, 6 *G. & J.*, 250. Yet it is here objected, that each of these complainants having a separate and distinct interest, and without showing any joint right or interest in the sum demanded, or without averring that the sum was paid out of joint funds or property, can only enforce their rights by separate and several suits. We are told that the rule in *Story's Eq. Pl.*, *sec.* 279, applies here, "that where there is a joinder of plaintiffs, who claim no common interest, but assert distinct and several claims against one and the same defendant," the objection of multifariousness is well taken. But this must unquestionably refer to claims distinct and several in their *nature and character;* and the illustration given proves it so: "If two plaintiffs should, in one bill, bring a joint demand and a several demand against the same defendant, it is multifarious." The incompatibility of these demands is apparent. They are dissimilar both in form and character. Not so, where the relief sought is common to all the plaintiffs, and against the defendant, constitutes but one subject matter of complaint. By paying one-sixth of the whole sum, the defendant here relieves himself of all the complainants; and it might more justly be considered vexatious than otherwise, to distribute such a claim into as many suits as there are claimants. At all events, it is not a fair subject of objection, by the defendant, that the suit is so framed as to occasion him the least possible expense and inconvenience, if otherwise, it violates no settled principle or practice in equity. Cases may be found, where the interests of the plaintiffs were distinct, and yet of a similar nature against the defendants, in which the objection of multifariousness has been disallowed. *Story's Eq. Pl.*, *sec.* 535. 3 *Paige*, 320. The courts, in deciding upon these objections, "seem to have considered what was convenient in particular cases

rather than to have attempted to lay down any absolute rule" for all cases. *Note to sec.* 278, *a*. Even in a case where there existed no privity of contract, where the sureties were different parties, and bound by three different bonds, but all for the same principal and the same engagement, a surety who has paid one of the bonds, was allowed to recover contribution in a bill filed against the other, as "the result of general equity, and on the ground of equality of burthen and benefit." *Deering vs. The Earl of Winchelsea*, 2 *Bos. & Pul.*, 270.

The case here is predicated upon the *privity subsisting between all the sureties in one bond*, and the money raised by the five complainants, for the payment of it, was, by every reasonable and fair construction, a joint fund. Each having advanced $10,000, amounting in the whole to $50,000, is it not obvious that they must have united together, and agreed, in equal proportions among themselves, to liquidate the precise amount of the bond, reserving against the recusant sureties their claim for contribution? The bond was for a specific sum, and the several amounts contributed by them, made but one fund, which, by the joint action of the parties, satisfied the bond. They now claim that the defendant shall pay his proportion of this sum as the sixth solvent surety, to be *afterwards* distributed to them according to the respective amount which each had contributed towards the liquidation of the bond. Such, whatever its form, would be the character of the decree in the premises. Suppose the sums advanced by each had been unequal, yet altogether constituting the whole amount, would it not be competent for such of them as had paid more than their just proportion, to bring all the solvent parties into chancery, for an adjustment of the account, and an equitable contribution among them? If so, how can it alter or affect the principle of adjustment among these sureties, that the several contributions by the complainants, were equal in amount on the part of each and all of them? It did not the less constitute one fund. All the sureties were jointly bound, and five of them jointly paid the bond. Each was also separately bound for the whole, and the present complainants having paid, between them, the precise

amount of the bond, must necessarily have concurred in the arrangement, and constituted a fund to which they are now entitled to call upon the others to contribute, to their relief.

This view may be safely urged as the only reasonable interpretation of the act, and the intent of the complainants; and the argument in the cause concedes, that where there is one common intent and object, and the parties are all jointly concerned, and the interest of one is not to be distinguished from the other, while the relief sought by each is of the same subject matter, and not different in its nature and character, the objection of multifariousness is removed. To exact five separate suits in a case like this, would not only lead to multiplicity of actions, but would, in fact, be oppressive upon the defendant himself. If such a course had been here pursued, each complainant claiming separate contribution upon the same subject matter, arising from unity of interest and obligation, each bill alike in form and substance, can it be doubted that the court would have directed a consolidation of them, if only to avoid unnecessary costs and litigation? The objection, therefore, of multifariousness, is not sustained.

The remaining question is, whether all the *necessary* parties to the bill have been brought to the notice of the court; four of the co-sureties being omitted under the averment, "*that at the time the said bond became due and payable*, the said co-sureties in the bond were insolvent, and unable to pay any part or portion of the said $50,000, or to contribute their proportion?" All parties, obligors and obligees, are required to be made parties to the suit. But an exception to this general rule is, that when either of the obligors, principal or surety is insolvent, he need not be made a party. *Story's Eq. Pl., sec.* 169. Is the fact of an insolvency here sufficiently alleged, so as to make it conclusive upon demurrer? In other words, will the case stated in the bill, entitle the complainants to a decree? It is alleged that these parties were insolvent and unable to pay at *the time the bond became due*, in January, 1841. The complainants filed their bill in August, 1845; and is the inference fair and sound, that the insolvency and inability of these co

sureties to contribute any portion, continued and existed at this period? Such inference is necessary, in order to excuse the omission to make them parties to the bill. The demurrer admits the truth of the facts stated in the bill. "It does not, however, admit the conclusions of law drawn from them, although they are also alleged in the bill." *Story's Eq. Pl., sec.* 452. "It may not be necessary to state the fact by a positive averment. If the terms be reasonably certain in their import, they are admitted by the demurrer." *Ibidem, sec. note* 3. Can such be said to be the reasonable import of this averment, that as they were insolvent at the time the bond was payable, they were necessarily so at the time of filing the bill, nearly five years afterwards? Is it sufficient to aver, that others, otherwise necessary parties to the bill, were insolvent four years before the filing of the bill? Such, certainly, is the true import of the terms "that they were unable to pay or contribute, at the time the bond became due." And it is not a necessary consequence, or admission by the demurrer, that they continued utterly insolvent up to the time of the filing of the bill, and unable to contribute any portion of their *quota* to the relief of the complainants. It can scarcely be maintained, that the inability which existed in January, 1811, attached by fair and irresistible inference and deduction, four years after, and is a deduction so strong as to preclude a traverse or denial of it. It may be, perhaps, a possible presumption, but certainly not irrebuttable; and the fact itself, being the material one which is set up to excuse the omission, it ought here to be so distinctly introduced as to exclude all conclusion to the contrary. And the fact admitted, that they were unable to pay or contribute at one particular time, does not negative the conclusion, that it may have been otherwise, at another period, separated by years. By the proper construction of the language, it would rather imply that they were so, and might, in the intermediate time, have acquired the means of contribution. At all events, the allegation is not brought down to the period of filing the bill, in terms, or by any sound legal inference from the averments of the bill, and the omission is fatal in its present form.

With respect to *Heth*, the principal in the bond, the averment of his insolvency is deemed sufficient. It is alleged, with regard to him, "that he was utterly insolvent, and unable to pay the sum, or any part thereof, to the obligee, in his lifetime, or to his executor, after his death; but, on the contrary, previous to the maturity of the bond, had become *utterly* and *hopelessly* insolvent." The bill further states, that *Heth* was deceased at the time of filing the bill, and all this conceded, affords a sufficient excuse for the omission to invoke his name into the proceedings. We consider these views confirmed by the case of *Byers vs. McClanahan*, 6 *G. & J.*, 250, and the cases there cited. See, also, 3 *Gill, at page* 94, *Clagett vs. Worthington.*

REMANDED UNDER THE ACT OF 1832, CH. 302, FOR FURTHER PROCEEDINGS.

MARYLAND AND NEW YORK COAL AND IRON COMPANY, *vs.* PHILIP WINGERT.—*December*, 1849.

The answer of a corporation, under its corporate seal, has the same force and effect, as evidence, as the answer of an individual not under oath would have in a like case, and no other or greater.

Where a party purchases lands with knowledge, actual or implied, of an outstanding incumbrance, he must stand in the same situation in which his vendor stood before alienation.

A bond of a mortgagor, for $6,000, secured by mortgage, was paid at its maturity, (1st of April, 1839,) by a check of the obligor for $5,000, and his promissory note for $1,270, payable 1st of April, 1840. Receipts for this check and note were endorsed on the bond, which was delivered up to the obligor. The note not being paid at maturity, it was HELD:

That, in the absence of proof of an express agreement to that effect, these receipts, and the delivery up of the bond, did not extinguish the lien of the mortgage.

The acceptance of a note will not extinguish a debt, unless there be an ex-

press contract or agreement to receive it as an absolute payment, and to run the risk of its being paid.

The issuing, by consent of parties, a commission to take testimony generally, without limitation as to the nature and purpose thereof, is regarded, in *Maryland*, as an admission that the issues are made up, and the general replication to defendant's answer entered.

Appeal from the equity side of *Washington* county court.

The original bill was filed by the appellee, on the 5th of March, 1842, for the sale of certain lands which had been mortgaged to him by one *Lewis Howell*, and afterwards conveyed by said *Howell* to the appellant, for payment of a balance due on the mortgage debt. The allegations of both the original and amended bills and answers thereto, together with the facts in the case, the several exhibits filed in the cause, and the testimony taken under the commission, are sufficiently stated in the opinion of this court.

The answers were under the corporate seal of the defendant, attested by the signature of its president. After the answer to the amended bill was filed, a commission was issued, by agreement of parties, to take testimony on the part both of complainant and defendant, and it does not appear from the record, that the general replication was ever entered.

On the 3rd of November, 1848, the court (Martin, C. J.,) passed a decree for the sale of the mortgaged premises, in accordance with the prayer of the bill. From this decree the defendant appealed.

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, and Frick, J.

By Semmes, and Perry, for the appellant, and
By Wm. Price, for the appellee.

Spence, J., delivered the opinion of this court.

The allegations in the original bill are, that on the 28th day of May, in the year 1838, a certain *Lewis Howell*, then of the city of *New York*, being indebted to the complainant in sundry

large sums of money, viz: the sum of $6,000, payable on the 1st day of April, 1839; also in the sum of $3,250, payable the 1st day of April, 1840; also the sum of $3,250, payable the 1st day of April, 1841; and also in sundry other large sums of money not then demandable; and intending to secure the payment of the said several sums of money to the complainant, did, on the 28th day of April, 1838, convey to the complainant certain real estate in *Allegany* county, particularly described in said deed. In which deed there is a condition, that it should be void, if said *Howell* paid the said several sums at the said several times in the said deed stated.

The bill also charges, that said *Howell* did, on the 31st day of October, 1838, by his deed, convey to the *Maryland and New York Iron and Coal Company*, the same real estate mortgaged to the complainant. That the *Maryland and New York Iron and Coal Company* was, at the date of said deed to them, and had continued to be, a body corporate. The bill states, that said *Howell* had not paid either of the said several sums of money, or any part of them, or either of them, but admits that the complainant had been paid, by said company, sundry sums. It admits the payment of $3,250, and the interest thereon, which was demandable on the 1st day of April, 1841; the payment of the sum which was demandable on the 1st day of April, 1840, and the interest which had accrued thereon. And of the sum of $6,000, which was payable on the 1st day of April, 1839, the complainant admits the payment of $5,000, together with the interest thereon, but charges expressly, that of this last mentioned sum, there remained due and unpaid the sum of $1,000, with interest thereon, from the 1st day of October, 1838. The answer of the respondent, to the bill, admits the allegations of the bill, except that the several sums of money charged by the bill or any part of either of them, was still due and unpaid, but avers that each and all of said several sums of money had been paid, and the bonds or single bills, the evidence of said indebtedness, had been surrendered and delivered up to the defendant, to be cancelled.

The respondent files, as exhibits with his answer, the several

bills obligatory, with the endorsements thereon, marked defendant's exhibits No. 2, No. 3, No. 4, No. 5. Subsequently, in the progress of this cause, the complainant asked and obtained leave to file an amended bill.

The amended bill charges, that the original contract, made with the complainant, for the purchase of the mortgaged lands mentioned in this controversy, was made by said *Howell* and a certain *George McCulloh*, as agents for the *Maryland and New York Iron and Coal Company*, with the complainant, and that said *Howell*, in said contract, was the agent for said company, and nothing more.

The bill alleges, that on the day the mortgage deed was executed by said *Howell*, he executed to the complainant bonds corresponding with the sums and dates mentioned in said mortgage, for $19,000; and the bill admits that the whole of the mortgage debt has been paid to the complainant, except the sum of $1,270, with the interest thereon, from the 1st of June, 1839, part of the sum of $6,000, mentioned in said mortgage, and by it made payable on the 1st day of April, 1839, which sum, or any part thereof, the bill charges, has never been paid to the complainant.

The amended bill charges, that at the date of the deed from *Lewis Howell* to the *Maryland and New York Iron and Coal Company*, no part of the purchase money had been paid by said *Howell* to the complainant, but the whole amount of the purchase money was a lien on the land. The amended bill also charges, that the whole amount of the purchase money which had been paid to complainant, was paid by said company, and that said *Howell* never paid any sum or sums on said claim, except as the agent of said company.

The respondent's amended answer to the amended bill, denies that *Lewis Howell* acted as the agent of the respondent, in the purchase of the land in question from complainant. It denies that the purchase was, in fact or intent, made by itself, through any authorised agent. The answer also denies that the whole of the moneys paid to the complainant, on account

of the purchase from him, or any part thereof, was paid to him by the respondent.

The first question which the bills and answers present for our review and decision is: Whether the *Maryland and New York Iron and Coal Company* were *bona fide* purchasers for valuable consideration, without notice of the lien of the complainant, under his mortgage deed? We consider the answer and amended answer of this corporation as having the same force and effect, as evidence, as the answer of an individual not under oath, would have in like cases, and no other or greater.

By the act of Assembly of 1837, ch. 218, passed on the 1st of March, 1837, the respondent in this suit was incorporated by the name of the *Maryland and New York Iron and Coal Company*. The only persons named in this act as corporators, are *Lewis Howell*, *Benjamin B. Howell*, and *Henry W. Howell*. It is shown by *Mr. Semmes'* evidence, that *Benjamin B. Howell*, who was the father of *Lewis Howell*, was president of the company at the time of these transactions betwent *L. Howell* and *P. Wingert*.

The complainant's exhibit C, which is the original contract made with *Wingert*, for the lands in question, was executed on the 22nd day of May, 1838, by *Philip Wingert* of the one part, and *Lewis Howell* of the other, by *George McCulloh*, his agent. This land was conveyed by deed of bargain and sale, by *Wingert*, the complainant, to *Lewis Howell*, the respondent, on the 23rd day of May, 1838. The mortgage deed and bills obligatory, for securing the purchase money for said land, were executed by *Lewis Howell*, in favor of *Philip Wingert*, on the 28th day of May, 1838. The deed from *Lewis Howell* to the *Maryland and New York Iron and Coal Company*, is dated the 31st of October, 1838.

We may here premise, that we are led into the inquiry of the *bona fides* of the sale of this land from *Howell* to the company, without notice of the incumbrance under *Wingert's* mortgage, from the argument of the appellant's solicitor, and not from such a defence set up by the answer. The answer

does not charge that the *Maryland and New York Iron and Coal Company* was a *bona fide* purchaser of this land, without notice of *Wingert's* lien under his mortgage deed.

We think the facts and circumstances, in connection with the evidence disclosed in the record, go very far to establish the fact, that *Lewis Howell* was acting in the character of agent or representative of this company, in the purchase of this land. The first section of the act of incorporation (1837, ch. 218,) names but three individuals, the first of whom is *Lewis Howell*. The second section fixes the amount of capital stock of said company, to wit: five thousand shares, of one hundred dollars each, of which the lands and mines of the said *Lewis Howell*, in *Allegany* county, shall constitute a part. This provision of the act referred to the lands which said *Howell* owned at the time of its enactment, namely, the 3rd of March 1837.

George McCulloh, a witness on the part of the complainant, by whom the contract for this land was made with *Wingert*, as set forth in complainant's exhibit C, when interrogated "whether the lands in relation to which the said agreement was made, were or were not intended, at the time, for the *Maryland and New York Iron and Coal Company?*" answers and says, "that he believes they were; *Mr. Benjamin B. Howell* and *Lewis Howell* sent him to *Hagerstown*, for the purpose of making the purchase of *Mr. Wingert*, for the company." To the question, whether *Lewis Howell* purchased the lands with his own means, or the means of others? answers, "that the lands, as he believes, were paid for by the means of others; the *Messrs. Howells* told him they were raising money from certain gentlemen, their associates, and were also using money of their own in making the purchases"

We think that the amended answer of the respondent throws very convincing light on this question of notice or knowledge of the transaction between *Howell* and *Wingert*. It states, "that after this, defendant had purchased the same land from the said *Howell*, it, of course, became interested to know whether the bonds executed as aforesaid, by the said *Howell* to the complainant, and which had been secured by a mortgage

on the lands, as aforesaid, were paid, and taken up, and cancelled." "That the first payment which this defendant undertook to make to the said complainant, in discharge of any of the said bonds, was the payment of the bond falling due the 1st day of April, 1842."

The answer further states, "that an adjustment and final settlement of all business between this defendant and the said *Lewis Howell*, having previously taken place, and said adjustment and settlement having been made in part, upon the basis that the unpaid bonds held by the complainant, were to be paid and discharged by this defendant, it thereupon took upon itself the duty, as it was bound to do, of paying these bonds."

No unbiased mind can read this answer without coming to the conclusion, that the respondent had not only such knowledge of this transaction between *Howell* and *Wingert*, and especially of the bonds and mortgage which *Wingert* held against *Howell* and the land, as to put the company upon inquiry, but that this company assumed and promised to pay off and discharge these incumbrances. It is true the answer insists, that the respondent considered the surrender of the bill obligatory, with the endorsements thereon, which was payable the 1st of April, 1837, an extinguishment of the debt for which it was given. These endorsements were a receipt for a check on the *Mineral Bank of Maryland*, for $5,000, and a receipt for a promissory note of *Lewis Howell*, for $1,270.

The answer admits knowledge of the fact, that the debt of which this bill obligatory was evidence, was secured by the mortgage.

From the evidence and admissions in this case, it is our opinion that the respondent acted with full knowledge, actual or implied, and must, therefore, stand in the same situation as *Lewis Howell* would have done, if he had not aliened these lands.

The next question which we are to consider is: did the surrender and delivery up of the bill obligatory, which became demandable on the 1st day of April, 1839, extinguish *Wingert*'s lien under his mortgage?

Chief Justice Parsons says, in the case of *Davis vs. Maynard*, 9 *Mass. R.*, 237: "The mortgage and the note were two distinct securities. Nothing but the payment of the debt will discharge the mortgage."

The case of *Glenn vs. Smith*, 2 *G. & J.*, 512, decides, "that to give to the acceptance of a note the effect of an absolute payment or extinguishment of a debt, a contract that it should be so, must be shown; an express agreement to receive it as payment, and to run the risk of its being paid, which is not sufficiently done by the receipt in this case."

It was insisted, in the argument of this case, that an express agreement was not the only mode by which the acceptance of *Howell's* promissory note could be made to operate an extinguishment of the mortgage debt. But that such an understanding of the parties might be implied from facts and circumstances.

If we were disposed to admit this doctrine, which we do not, since the decision in *Glenn vs. Smith*, the facts and circumstances in this case would not justify such an implication. To infer, from the fact of *Wingert's* delivering up of *Howell's* bill obligatory, and taking his promissory note for a balance which was due on it, which balance was secured by a mortgage, is proof that he, *Wingert*, intended thereby to extinguish his lien under his mortgage, and take the risk of collecting the money, though the note only would be to presume *Wingert* destitute of the care and prudence which every man of common prudence would exercise in such a transaction.

That these acts will not work an extinguishment of a mortgagee's lien, is conclusively settled on authority. *Vide* the case of *Teed vs. Carruthers*, 2 *Younge and Collyer's Rep.*, 31. In this case, a debt of £10,000 was secured by mortgage from *Carruthers*, the defendant, to *Teed*, the plaintiff. Subsequently, *Carruthers*, the mortgagor, gave to *Teed*, the mortgagee, a check for £7,000, in part discharge of the mortgage debt. He also gave to the plaintiff, *Teed*, two bills of exchange, one for £1,600, and the other for £1,500, intended to be in discharge

of the £3,000, the residue of the principal mortgage money, and the interest then due on the security.

Upon the receipt of the check, and the bills of exchange, the plaintiff gave a receipt for the mortgage money and interest, and the plaintiff delivered up the title deeds and mortgage deeds to the defendant.

The check for £7,000 was subsequently paid. The two bills of exchange were dishonored, and not paid.

Teed, the mortgagee, filed his bill, and among other things, prayed for redemption, and in default of redemption, for a foreclosure of the equity of redemption in the premises.

Carruthers, in his answer, among other matters, stated as his defence, that in pursuance of arrangements, the plaintiff, upon such payments being made to him, as aforesaid, delivered up to the defendant the mortgage deeds and title deed, and at the same time, gave to the defendant a receipt in writing, signed by the plaintiff, as follows:

"Received this day, of *John Carruthers*, *Esq.*, the sum of £7,000, in cash, and two bills of exchange, as under, for £3,120, drawn by *Messrs. Carruthers & Co.*, one dated 16th December, for £1,620, the other dated the 23rd of December, for £1,500, and which check for £7,000, and bills for £3,120, making, together, £10,120, are in full of principal and interest due to me upon a mortgage of *Mr. Carruthers*, freehold property in *Kent* and *Sussex*, for £10,000; and I do hereby undertake, when required, to execute a conveyance of said property. THOMAS TEED."

The vice chancellor, in his opinion in this case says: "If I were satisfied that the agreement between them was understood and intended by them to be, that the mortgaged estate should be absolutely discharged, whether the bills were honored or dishonored, productive or waste-paper, however unusual or improvident I might consider such an agreement, I might very possibly have thought it right to give effect to such a contract clearly proved." The vice chancellor, in this case, decreed a foreclosure.

It was suggested, in the argument, that no replication had

been filed in this case. In *England*, after a commission has been issued by consent, and testimony has been taken, courts of equity consider the replication so much a matter of form, as that they will allow it to be filed *nunc pro tunc*, even after decree. *Mosely's Rep.*, 296, *Rodney vs. Hare, et al.*

In *Maryland*, the issuing, by consent of parties, a commission to take testimony generally, without limitation as to the nature and purposes thereof, is regarded as an admission that the issues are made up, and that the general replication to the defendant's answer, has been entered by the complainant. To reject, at the instance of the defendant, the testimony taken under such circumstances, would work surprise upon the plaintiff. And to permit such an objection, when not taken in the court below, to be raised in the appellate court, where its omission cannot be remedied, would, in its consequences, however unintentional, be permitting a defendant to practice a fraud upon a complainant, which might be fatal to his interests.

Upon principle and authority, we are of opinion the county court were correct, and affirm the decree, with costs.

DECREE AFFIRMED.

JAMES ROBINETT *vs.* KEZIAH WILSON.—*December*, 1849.

Declarations of a party under whom the defendant claims, by title subsequently acquired, as to a receipt which he was about to execute to defendant, and which constitutes the title paper of the latter, are admissible in evidence against the defendant.

It is the unquestioned doctrine of this court, that receipts are not regarded as written, conclusive evidence, but may be explained or contradicted by oral testimony.

In this case, a receipt given by a son to his mother, for his distributive share of his father's personal estate, upon which the mother administered, and which was filed in the orphans court, with the administration account, was set aside upon parol proof that it was given without consideration, and was not intended as a *bona fide* transfer of all the son's interest in said estate.

Appeal from the equity side of *Allegany* county court.

On the 15th of January, 1841, *George R. Wilson* executed a deed conveying to the appellant all his real and personal estate, upon certain conditions therein mentioned. This deed, after reciting a mortgage previously executed to the appellant, to secure an indebtedness due him by said *Wilson*, and that, "in consideration of said mortgage debt, and upon the conditions hereinafter mentioned," he is willing to release to the said *James Robinett*, all his, "the said *Wilson's* equity of redemption in all said real and personal estate, and to vest a fee simple title thereto in said *Robinett*," proceeds to convey to the latter "all the real estate lying and being in *Allegany* county, in the State of *Maryland*, or in any other county of said State, of which *Amos Wilson*, late of said county, deceased, died seized and possessed, or in any manner entitled to, either at law or in equity, which said real estate descended at the death of said *Amos*, to the said *George W. Wilson*, as his only heir at law," consisting, &c. "Also, all the personal estate to which the said *George R. Wilson* became entitled, and is now possessed of, as the legal representative of the said deceased, consisting, in part, of four negroes," &c. "Provided, nevertheless, and it is hereby expressly declared to be a condition upon which this indenture is executed, that the said *James Robinett* shall provide a suitable maintenance and support for him, the said *George R. Wilson*, and permit him to reside and have his house on said real estate during his natural life, and shall also provide, with the aid of her own property, a suitable maintenance and support for *Keziah Wilson*, mother of the said *George R. Wilson*, and permit her to reside and have her home on said real estate during her natural life."

Keziah Wilson, the appellee, was the widow of said *Amos Wilson*, administered on his estate, returned an inventory thereof, and by the order of the orphans court, took possession of the property, and charged herself therewith, at its appraised value. On the 10th of April, 1838, she settled her final account, and distributed the balance thereby due the estate, by order of the court, one-third to herself, as widow, and the en

tire balance of $598.26⅔, to her only son, *George R. Wilson*, and filed in said court the receipt from said *George*, recited in the opinion of this court.

George R. Wilson died on the 26th of December, 1842, intestate and without issue, leaving his said mother his sole next of kin, who disputed the title of the appellant to the property conveyed by the deed above referred to, and the latter, on the 23rd of February, 1843, filed his bill for a division of the property conveyed to him by said deed, and that said *Keziah Wilson* might have her dower in the real estate laid off and set apart to her, and charging that said receipt of said *George R. Wilson* was executed without consideration, and was null and void, and that said *George*, notwithstanding said receipt, still owned and was entitled to the whole of his distributive share of his father's personal estate, at the date of the deed to complainant.

The defences set up in the answers of the defendant against this claim, and the proofs in the case, are sufficiently stated in the opinion of this court. On the 3rd of October, 1848, the court below, (MARTIN, C. J.,) passed a decree dismissing the bill, so far as a division of the personal estate was asked for, from which the complainant appealed to this court.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, and MAGRUDER, J.

By PERRY, and SEMMES, for the appellant, and
By MCKAIG, for the appellee.

DORSEY, C. J., delivered the opinion of this court.

There is no dispute in this case, as to the sufficiency of the deed under which the plaintiff claims, to entitle him to the relief sought by the bill, unless the defences set up against it in the answers, are established to the satisfaction of this court. One of those defences was, "that said deed was obtained from the said *George R. Wilson* by fraud and circumvention, and that, too, at a time when the said *George R. Wilson*, from his

dissipated habits, and physical and mental debility, was unfit and incapable of making a valid deed or contract." In support of this defence, which, being a matter in avoidance, must be proved independently of the statements in the answers; the record furnishes no testimony which could give to it the aspect of a momentary bar to the plaintiff's prayer for relief.

The second defence, by which the defendant seeks to protect herself against the plaintiff's claim, is a receipt in the following terms:

"Received, April 10th, 1838, of my mother, *Keziah Wilson*, administrator of *Amos Wilson*, late of *Allegany* county, deceased, the sum of five hundred and ninety-eight dollars, twenty-six and two-thirds cents, in full of distributive share of the personal estate of said deceased, as per account settled in the orphans court this day. GEORGE R. WILSON."

"*Allegany county, to wit:*

On this 10th day of April, 1838, before me, the subscriber, appears *George R. Wilson*, and acknowledges the aforegoing receipt to be his act and deed, for the purposes therein mentioned. CHARLES HECK, Register."

It is conceded, as well it might be, that no part of the money consideration, specified in the receipt, was paid to him who signed it. On the part of the plaintiff, it is insisted, that this receipt was merely colorable, without any valuable consideration being given to obtain it, and that it never was designed as a *bona fide* transfer of all *George R. Wilson's* interest in the personal estate of his deceased father. The defendant, by her answer, alleges, that the said receipt "was given by the said *George R. Wilson* to this defendant in good faith and voluntarily, upon a good and valid consideration then existing, and as a full and final discharge to her, as the said administratrix, for his share of the said personal estate of his father; and that the said receipt was intended and meant, by the said *George R. Wilson*, at the time it was given, and ever afterwards, so far as this defendant has any knowledge, to be a legal and valid discharge of the said *George R. Wilson* to all and every part of his share of the personal estate of his father, and of his in-

terest therein, or to the proceeds thereof, without any condition or reservation whatsoever, and without any pretence that he, his heirs or assigns should thereafter have any claim or right to any of the said personal estate." In her answer to a bill filed, called a supplemental bill, she states to have been "the consideration of said receipt, that this defendant was allowed, in the settlement she made with the said *George R. Wilson*, the sum mentioned in said receipt, as a compensation for her long and laborious services in nursing the said *George R. Wilson*, night and day, during his protracted illness. That at the time of this settlement, *George R. Wilson* was a sober man, and knew and understood exactly how the property and accounts were situated." By the proof in the cause, and in her previous answer, it is shown that the nursing and services rendered during this protracted illness, were in the lifetime of her husband. In her first answer she also explicitly declares, "that the said receipt was not given and received for the purpose of guarding and protecting the said *George R. Wilson* against debts, or for protecting him against himself, or against designing persons, but that the same was given by the said *George R. Wilson* to this defendant in good faith."

It is impossible to read the defendant's answer in relation to this receipt, and not to perceive that it was a transaction, under the circumstances surrounding it, of a most extraordinary and anomalous character. That it required no inconsiderable share of credulity to silence those doubts which, unbidden, would present themselves to every investigating mind, whether all the facts connected with that receipt could be fully and fairly detailed in the answers of the defendant. It would be a severe requisition upon human credence to demand of it the belief, that a mother who, in the lifetime of her husband, had devoted herself for years, by night and by day, to the sick bed of their only child, would, so soon after her husband's death, upon the imperfect restoration of her child to health, and when her necessities did not require it, permit her child, even if, in the fullness of his filial affection and gratitude, he were to offer it, to strip himself of a large portion of the small estate which he

derived from his father, and which, in his feeble and hopeless health, was indispensable to his comfortable maintenance and support. A mother's feelings, had such an offer been made to her, would have imperatively prompted an instantaneous refusal of its acceptance.

But this is not the most startling fact in exciting our doubts. It is not pretended, in the answers, that it was a voluntary gift of a grateful child to an affectionate and devoted mother; but, in the language of the answer, it is thus described: "this defendant states, in relation to the consideration of said receipt, that this defendant was allowed, in the settlement she made with the said *George R. Wilson*, the sum mentioned in said receipt as a compensation for her long and laborious services in nursing the said *George R. Wilson*, night and day, during his protracted illness." What? A compensation demanded of a son by a mother, in a condition as well to live as she was, for discharging a maternal duty in nursing their only child, whilst living with her under his father's roof? Such an insinuation is a reproach to the noblest portion of creation; is contrary to all observation and experience; and a just regard for our venerated mothers, should forbid our accrediting it, but upon overwhelming proof; certainly not upon the asseverations of an interested party. The answer asserts the consideration in the receipt as the result of an allowance made on a settlement between the mother and son. What settlement? One of debits and credits between them, in which either the son or the mother, but for this allowance, would have been indebted, the one to the other, in the amount specified in the receipt? The proof of both parties in the record before us, conclusively demonstrates that there could have been no such settlement, and, consequently, that no such allowance as a compensation for the discharge of maternal duties, rendered without hope or promise of reward, could have been made.

It cannot escape the most superficial peruser of the answers in this case, that the ingenuity of the defendant has been most heavily taxed, in attempting to give a satisfactory explanation of the receipt on which she relies in bar of the plaintiff's claim

The suggestion of the settlement must be the offspring of such a perplexing difficulty. Some other of the statements, too, probably relied on in the answers as sustaining the receipt, may well be regarded as impairing the efficacy designed to be given to it. Of this character are the asseverations in the answers, that at the time of giving the receipt, he was exempt from all habits of dissipation. That the "receipt was not given and received for the purpose of guarding and protecting the said *George R. Wilson* against debts, or for protecting him against himself, or against designing persons." If these assertions and denials had not been made in the answer, and protection against debts meant, as it doubtless did, debts subsequently contracted, a sufficient, a praiseworthy intention, in taking the receipt with the import which she ascribes to it, might then be apparent to the court, which would cheerfully yield to it its full force and operation. But, as it is now before us, it stands bereft of every consideration which should stamp on it the effect now claimed for it by the defendant. It may, then, well be asked, what possible motive could have induced the giving or accepting this receipt? The solution to this inquiry is at once satisfactorily given by referring to the testimony of *George Slicer*, who narrates a conversation between himself and *George R. Wilson*, and which, as she claims under the latter, by title subsequently acquired, is admissible evidence against her; it being the unquestioned doctrine of this court, that receipts are not regarded as written, conclusive evidence, but may be explained or contradicted by oral testimony. *Slicer* states, that before the execution of the receipt, *George R. Wilson* stated to him, "that the securities on his mother's bond, as administratrix, were becoming uneasy about their liability for her, and asked the witness if he, *George*, could not settle the matter, so as to prevent his mother's securities from citing her to court? Witness told him he could easily settle it, by giving his receipt in full to his mother, as administratrix, and then he and his mother could settle it to suit themselves." To this suggestion it is more than probable that this receipt owes its birth. That this receipt never was intended, by the parties to it, to have the

operation now claimed for it in the answers of the defendant, is fully established when we connect, with the facts referred to in the preceding remarks, the other testimony taken in the cause. By which it appears, that *George R. Wilson*, always after the execution of the receipt, in the presence of his mother, claimed the same right in the property embraced by it, that he had done before, and that she never denied his title thereto. That when informed by a witness, who was sent by the plaintiff for that purpose, that he was about to take a deed from her son with like provisions to those contained in the deed afterwards executed, but that he did not wish to enter into the arrangement without her consent, or unless she would be satisfied; she replied, "that she had no objections to *James Robinett*, she would as leave her son, *George*, should convey his property to him as any body else." When called on by the creditors of her son, or those charged with the collection of debts due by him, she referred them, for payment, to the plaintiff; and the only anxiety she expressed upon the subject was, lest he might be obliged, for the payment of the debts, to sell two of the negroes, *Ann* and *Beck;* that if their sale could be prevented, she would be satisfied.

Such conduct and declarations on her part, are irreconcilable with her claim, as now asserted under the receipt. The answers of the defendant, so confidently relied on in behalf of the defendant, interpose no bar to the relief sought by the plaintiff, are over-ruled and controlled by the facts and circumstances attendant on the transactions in controversy, any by the testimony of *John Davis*, *George Slicer*, *Eliza McElfresh*, *Henry B. Elbin*, *Amos McElfresh*, *John McElfresh*, and *George Robinett*, witnesses examined in the cause. The county court, therefore, erred in its decree of the 3rd of November, 1848, ordering "that the bill in this case, so far as it prays a division of the personal estate therein mentioned, be and the same is hereby dismissed."

This court will sign a decree reversing the said decree of the county court, and remanding the case thereto, that such further proceedings may be had therein, as will give to the plaintiff the

relief to which, consistently with this opinion, he has shown himself entitled The county court taking care to require of the appellant, that he make such provision for the appellee as, with her own property, will secure to her a suitable maintenance and support during her life.

DECREE REVERSED, AND
CAUSE REMANDED.

WM. H. TUCK, ADM'R D. B. N., C. T. A., OF LEVIN BOONE, *vs.* BENEDICT BOONE.—*December*, 1849.

This court, by the act of 1825, ch. 117, is confined to the points adjudicated by the court below, and questions relating to irregularity of proceedings in the county court, not raised there, cannot be examined here.

Letters of administration *de bonis non*, with the will annexed, are inoperative and inadmissible in evidence, unless authenticated by the official seal of the orphans court, by which they were granted.

The seal of the court, at the end of the will, authenticating the copy of the will, is not sufficient to authenticate the grant of the annexed letters of administration,

The will and the letters together, constitute the plaintiff's title to sue as administrator *de bonis non*, with the will annexed, and if the grant of the letters is defective, the rejection of the will as inadmissible to sustain the issue joined on the plea of *ne unques administrator*, necessarily follows:

Appeal from *Frederick* county court.

In this case, the plaintiff below, to maintain the issue joined on the plea of *ne unques administrator*, and for the purpose of proving his title as administrator *d. b. n., c. t. a.*, of *Levin Boone*, of *Prince George's* county, deceased, offered in evidence a paper purporting to be the grant of such letters by the orphans court of said county, which was simply signed, "Test, *Philemon Chew*, register." To this paper was annexed a copy of the will of said *Boone*, in which the testator bequeathed the

residue of his property (which included the negroes in controversy in this case,) to his wife *Maria Boone*, during her life. The certificate at the end of this copy, is as follows:

"In testimony that the foregoing copy of *Levin Boone's* will and testament, and codicil to the same, are truly taken and copied from the originals filed and recorded in the register of wills' office for *Prince George's* county, I have hereto set my hand, and affixed the seal of the orphans court of said county, this 20th day of December, 1842.

(Seal.) Test: PHIL. CHEW, Reg'r."

The defendant objected to the admissibility of this paper, on the ground that the letters of administration, contained therein, had not the seal of the orphans court of *Prince George's* county affixed thereto; which objection the court (MARSHALL, A. J.,) sustained, and rejected the testimony on said ground. To this opinion and ruling of the court, the plaintiff excepted.

The above was the only exception taken in the case. Issue was also joined on the plea of *non cul.*, and the verdict of the jury was, that the defendant "did not assume upon himself and promise, in manner and form as the said plaintiff above against him complains, as the said defendant above, by pleading hath alleged," upon which judgment was rendered for the defendant. The defendant also demurred to the plaintiff's replication to the plea of limitations, the proceedings upon which are fully stated in the opinion of this court, to which the plaintiff appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, MARTIN, and FRICK, J.

By CAUSIN, for the appellant, who, among other points stated in the opinion, argued, that the judgment was erroneous, because, as the jury did not find a verdict in conformity with the pleadings in the case, no judgment could be entered on the verdict as found.

By F. A. SCHLEY, for the appellee.

MARTIN, J., delivered the opinion of this court.

This was an action of trover instituted in *Frederick* county court, by the appellant, as administrator *de bonis non, cum testamento annexo*, of *Levin Boone*, deceased, against the appellee, to recover the value of certain negroes mentioned in the declaration.

Three pleas were pleaded by the defendant. *First*, not guilty. *Second*, the statute of limitations. And *third*, *ne unques administrator*. Issues were joined upon the *first* and *third* pleas. To the *second* plea the plaintiff replied special matter, showing that he had brought the suit within three years, and that the plea of the statute of limitations interposed no bar to his recovery. To this replication the defendant demurred. The demurrer was overruled. The court decided that the matters set forth in the replication were, in law, a sufficient answer to the plea of the statute of limitations. No further proceedings were had with respect to this plea. And in this condition of the pleadings, the jury were sworn to try the issues in the cause, which appear from the amended record, to have been issues in fact, joined upon the pleas of *non cul.*, and *ne unques administrator*.

It appears, from the bill of exceptions taken in this case, that at the trial below, the plaintiff, to support the issue joined upon this plea of *ne unques administrator*, and to prove his title to the negroes, as administrator *de bonis non*, offered in evidence a paper purporting to be letters of administration *de bonis non, cum testamento annexo*, granted by the orphans court of *Prince George's* county. The will thus annexed, was certified by the register, as truly taken and copied from the original, filed and recorded in the register of wills' office for *Prince George's* county.

It appears from the exception, that the defendant objected to the admissibility of this paper as letters of administration *de bonis non, cum testamento annexo*, upon the ground, that it was not authenticated by the seal of the orphans court of *Prince George's* county. The objection was sustained. And confined as we are, by the provisions of the act of Assembly

of 1825, ch. 117, to the points adjudicated by the court below, it is perfectly manifest that the only proposition raised for our examination by this record, is that which relates to the ruling of the county court, with respect to the question of evidence presented for their decision.

By the thirteenth section of the act of 1798, ch. 101, sub. ch. 3, it is declared, that letters testamentary shall be granted under the seal of the orphans court. The form of such letters is then prescribed. By the second section of the same act of Assembly, sub. ch. 14, it is provided, that if an executor or administrator shall die before administration is completed, letters *de bonis non* may be granted at the discretion of the court, with a copy of the will annexed, if the case require it, and the form of the letters shall be as hereinbefore directed, except that the words, "not already administered," shall be added in their proper place. Letters *de bonis non*, with the will annexed, are similar therefor, in all respects, to the original testamentary letters, with the single exception indicated in the section to which we have referred; and certainly no proposition can be more clear, both upon the terms of the act of Assembly of 1798, and the general principles of evidence with respect to the mode in which the acts and judgments of courts are manifested, than that a paper purporting to contain letters of administration, is inoperative, unless it is authenticated by the official seal of the court, from which it is supposed to proceed. The court below, therefore, were clearly right in rejecting the paper offered by the plaintiff, as his letters of administration, as it did not appear to have been granted under the seal of the orphans court. The point made by the counsel for the appellant, that the seal at the end of the will was sufficient to authenticate the grant of the letters, cannot be sustained. For the register certifies, in terms so clear and plain as not to be mistaken, that the official seal was annexed, not as evidencing the grant of the letters of administration, but as testimony that the paper purporting to be a copy of the will of *Levin Boone*, was truly taken and copied from the originals filed and recorded in the office. It is apparent from the face of the certificate, that the seal of the

orphans court was introduced and used by the register to verify the transcript of the will, and not for the purpose of authenticating the letters of administration.

The counsel for the appellant has also contended, that even assuming that the court were correct in rejecting the paper purporting to be the letters of administration, they erred in treating as inadmissible the copy of the will. This proposition cannot be maintained. The will of *Levin Boone* was offered in evidence as a paper annexed to the letters of administration, for the purpose, as avowed by the defendant, of sustaining the issue joined upon the plea of *ne unques administrator*, and to establish his title as administrator *de bonis non, cum testamento annexo*. The will, therefore, could only be regarded as competent evidence to support the issue joined upon this plea, as a paper connected with the letters of administration. The two papers constituted, together, the title of the appellant as administrator *de bonis non*, with the will annexed. The letters of administration, and the copy of the will, were offered therefore in evidence as an entire paper. In the absence of either, the right of the plaintiff to sue as administrator, would be incomplete. And the court having properly determined that the letters of administration were objectionable upon the ground that they were not authenticated by the seal of the orphans court, the rejection of the will as inadmissible to sustain the issue joined on the plea of *ne unques administrator*, resulted as a necessary consequence.

We think there was no error in the ruling of the court below, and that the judgment must be affirmed.

The decision we have thus pronounced, is confirmed exclusively to the question raised by the bill of exceptions, and we have forborne to express any opinion upon the various points discussed by the counsel for the appellant, with respect to the supposed irregularity of the proceedings in the county court, as they were not open for examination upon this appeal.

JUDGMENT AFFIRMED.

GREENBURY B. WILSON *vs.* GREENBURY B. WILSON, GARNISHEE OF SAMUEL M. TINSLEY AND JOHN A. KEEDY.—GREENBURY B. WILSON, GARNISHEE OF SAMUEL M. TINSLEY AND JOHN A. KEEDY, *vs.* GREENBURY B. WILSON.—*December*, 1849.

The term "indebted," in the act of 1795, ch. 56, regulating the suing out of attachments, is not to be construed in a technical or strict legal sense.

An attachment may issue on any demand arising *ex contractu*, where the contract ascertains the amount of indebtedness, or fixes a standard so certain as to enable the plaintiff, by affidavit, to aver it, or the jury, by their verdict, to ascertain and find it.

By the contract in this case, the defendants were to guarantee the inspection of flour they were to deliver, and if it should not pass superfine, were to make such deduction "as is customary between the different qualities of flour in the place where the flour may be inspected." One thousand eight hundred barrels were delivered, and did not pass superfine. HELD:

That this difference could be as easily ascertained as the value of goods sold, where no price is fixed, and this contract may be the foundation of proceedings by attachment.

Cross-appeals from *Baltimore* county court.

This was an *attachment* sued out by the appellant, upon a certain agreement referred to in the opinion of this court. The appellant made oath, before the justice who issued the warrant, "that *Samuel M. Tinsley* and *John A. Keedy*, merchants and co-partners trading under the name of *S. M. Tinsley & Co.*, are justly and *bona fide* indebted unto him, the said *Greenbury B. Wilson*, a merchant trading under the name of *G. B. Wilson & Co.*, in the just and full sum of $900, over and above all discounts, for a deduction of 50 cents per barrel on eighteen hundred barrels of flour sold by said defendants to the said plaintiff, under the agreement hereto attached, the said flour not having passed inspection as superfine." The terms of the agreement referred to, are sufficiently stated in the opinion of this court. An *attachment* was issued, and returned "laid in the hands of *Greenbury B. Wilson*, trading under the firm of *G. B. Wilson & Co.*" The garnishee appeared to the *capias*

and pleaded *non assumpsit* and *nulla bona* of the defendants in his hands, upon which issues were joined.

In the course of the trial, and after evidence had been offered to the jury, which the opinion of this court renders it unnecessary to state, the defendants offered four prayers, one of which, only, the court (LE GRAND, J.,) granted, viz: "That the plaintiff is not entitled to recover, because the claim in this case is for unliquidated damages, as shown in the proceedings in this case." The plaintiff excepted to the granting of this prayer, and the defendants excepted to the refusal to grant the other prayers, and both parties appealed to this court. The propriety of granting the above prayer, was the only question decided by this court, and a statement of the testimony and the other prayers is, therefore, unnecessary.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, and FRICK, J.

By T. P. SCOTT, for *Wilson*, the plaintiff, and
By MAYER and BUCHANAN, for the defendants.

SPENCE, J., delivered the opinion of this court.

This was a proceeding by way of attachment in *Baltimore* county court.

The record states the proceeding as follows:

Be it remembered, that heretofore, to wit, on the twenty-first day of December, in the year of our Lord, one thousand eight hundred and forty-four, *Thomas Hanson Belt, Esqr.*, one of the justices of the State of *Maryland*, in and for the city of *Baltimore*, pursuant to an act of the General Assembly of *Maryland*, in such case made and provided, sent to the clerk of *Baltimore* county court here a certain affidavit made before him, with an agreement thereto annexed.

The agreement produced to the justice of the peace, by *Greenbury B. Wilson*, at the time of making the affidavit, among other stipulations, contains the following one:

"It is further understood, *Messrs. N. M. Tinsley & Co.* are

to guarantee the inspection of the flour, and if the flour should not pass superfine, then the said *Wilson* is to furnish *Messrs. S. M. Tinsley & Co.* with the inspector's certificate of the qualities of the flour as passed by him, and *Messrs. S. M. Tinsley & Co.* are bound to make such reduction as is customary, between the different qualities of flour in the place where the flour may be inspected."

Upon the affidavit of *Greenbury B. Wilson*, the justice of the peace issued his warrant to the clerk of *Baltimore* county court, to issue a writ of attachment, which the clerk accordingly did. The attachment was laid, and the garnishee appeared by counsel, and pleaded *non assumpsit* and *nulla bona*, and upon these pleas, issues were joined. After the evidence had been offered to the jury, several prayers were offered to the court, for instructions to the jury, by the defendant, all of which were refused by the court, but the following one:

"The plaintiff cannot recover, because his claim is for unliquidated damages." This instruction the county court gave, and the plaintiff excepted.

This instruction presents the only question for our decision in this case. That the term "indebted," in the act of 1795, is not to be construed in a technical or strict legal sense, is manifest from its association and connection with the terms used in the same section. After directing that the creditor shall make oath that the debtor is *bona fide* indebted, &c., "and at the same time producing the bond or bonds, bill or bills, protested bill or bills of exchange, promissory note or notes, or other instrument or instruments of writing, account or accounts, by which the said debtor is so indebted, the justice of the peace is authorised and required forthwith to issue his warrant to the clerk," &c.

The claim on which the justice issued his warrant, was presented to him at the time he awarded the warrant, and the question was, whether this demand arose *ex contractu*, and the the contract ascertained the amount of indebtedness? or was it susceptible of ascertainment by some standard fixed by the

contract itself, so certain as to enable the plaintiff by affidavit to aver it, or the jury, by their verdict, to ascertain and find it?

The contract was, that *Tinsley & Co.* were to guarantee the inspection of the flour which they were to deliver, and if it should not pass superfine, then said *Wilson* was to furnish *Tinsley & Co.* with the inspector's certificate of the flour, as passed by him, and *Tinsley & Co.* were to make such deduction as was customary between the different qualities of flour in the place where the flour might be inspected, and superfine flour. *Wilson* swore that the eighteen hundred barrels of flour did not pass superfine, and that the difference in the value of flour, according to the custom of the place where it was inspected, was fifty cents per barrel, and that the said *Tinsley & Co.* were *bona fide* indebted to the plaintiff in the just and full sum of $900, over and above all discounts. The standard was the difference in the value of the flour at the place where in was inspected, between flour superfine, and flour superfine bad. This was as easily ascertained as the value of goods sold, where no price was fixed as to value. The standard was so clearly ascertained by the contract itself, as to enable the plaintiff to aver it in his affidavit.

The court erred in their instruction to the jury, and the judgment is reversed, and procedendo awarded.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

Greenbury B. Wilson & Co., *vs.* John A. Keedy.—John A. Keedy, *vs.* Greenbury B. Wilson & Co.—*December*, 1849.

A joint debt cannot be set off against a separate one, nor a separate debt against a joint demand.

In this case it was Held: that a debt due by a partnership of which the plain-

tiff was a member to the defendant, could not be set off against the separate claim of the plaintiff.

Cross-appeals from *Baltimore* county court.

This was an action of *assumpsit* instituted by the appellant, *Keedy*, against the appellee, *Wilson*, trading under the style of *G. B. Wilson & Co.* The declaration contains the general *indebitatus assumpsit* counts, the common money counts, and a count upon an account stated. The plea was *non assumpsit*, upon which issue was joined. It was agreed that a set off mentioned below, might be offered in bar, as though formally pleaded, but the plaintiff, by this agreement, did not admit the truth of the plea, or the sufficiency of it, if proven.

At the trial, the plaintiff offered in evidence the following receipt, admitted to have been signed by the defendant and delivered to the plaintiff when he handed to the former the draft therein mentioned, for collection:

"Rec'd, *Balto.*, 8th August, 1843, *Messrs. S. & M. Tinsley & Co's* draft, in favor of *Mr. John A. Keedy*, in *New Orleans*, at ten days sight, for fifteen hundred dollars, for collection. G. B. Wilson & Co."

The further proof on the part of the plaintiff, was, that *Wilson* collected the draft and became indebted to *Keedy* for the amount, with abatement of $573.95, paid to *Keedy's* order by *Wilson*, and of commissions for collection of $26.25. Against this claim the defendant relies on a set off of $900 damages, for which he alleges the firm of *S. M. Tinsley & Co.*, of which the plaintiff, at the time was a partner, is liable, for violation of a contract of sale of flour, being the same demand for which the attachment in the preceding case was issued. The testimony in the attachment case was by agreement, considered a part of this.

Upon this testimony the plaintiff offered six prayers, the first of which, only, it is necessary to state, viz: "That the plaintiff is entitled to recover, if the jury believe that defendant collected the money in the receipt and draft mentioned, notwithstanding they should also find, that the defendant sustained

the damage mentioned in his claim of set off, and that plaintiff was a partner of the firm of *S. M. Tinsley & Co.*, when said contract was made, because the claim being against the plaintiff, and another, cannot be set off against the separate demand of the plaintiff;" which the court (LE GRAND, J.,) granted, and rejected all others. The plaintiff excepted to the refusal to grant his rejected prayers, and defendant excepted to the granting of the above prayer, and both parties appealed to this court. The propriety of granting the above prayer, being the only question decided on this appeal, it is not necessary to state the substance of the other prayers, or the testimony in the case.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, and FRICK, J.

By BUCHANAN and MAYER, for *Keedy*, the plaintiff, and
By T. P. SCOTT, for defendant.

SPENCE, J., delivered the opinion of this court.

The only question to which our attention has been invited, and our judgment asked, in this case, arises on the decision of the county court on the plaintiff's first prayer. The decision of the Court of Appeals, at the present term, in the case of *Milburn vs. Guyther*, *ante* 92, is conclusive in this, for it decides "that a joint debt cannot be set off against a separate one, nor a separate debt against a joint demand." The judgment is affirmed.

JUDGMENT AFFIRMED.

JOHN JONES *vs.* BENJAMIN W. JONES.—*December*, 1849.

The intention to raise an election, must be clear and manifest from the will itself.

That intention must be collected from the face of the instrument, and without a clear and express manifestation, it cannot be presumed to extend to property which did not otherwise pass under the will.

If a will sufficient to pass personalty, gives a legacy to the heir, and devises the realty away from him, he may take the legacy, and claim the estate by descent; but if the legacy be on the express condition annexed, that he shall confirm the devise, he cannot take the legacy and disaffirm the devise.

The wills of infants and feme coverts being void as to realty, raise no implication, and the heir may claim both the legacy and the land devised to another, by such a will.

A will of lands that is not executed and attested according to our statutes, can create no election as to the lands here, *from implication*, because such an instrument is no will here, and, therefore, inoperative.

In this case, a will was executed in *Pennsylvania*, before two witnesses only, and, therefore, void as to the lands in *Maryland*. It contained no express condition requiring an election as to the lands here. HELD: that it could not operate to divest a child of his inheritance here, or put him to his election.

APPEAL from the *Court of Chancery*.

Evan Jones, a citizen of *Chester* county, in the State of *Pennsylvania*, died in September, 1845, seized of real and personal estate, both in that State and in *Maryland*, leaving a last will and testament, by which he bequeaths as follows:

"*First.*—I give and bequeath to my son, *Benjamin*, all my estate, real, personal or mixed, with the following exceptions: All the accounts against *John*, I give to him, and the improvements I made on the farm belonging to his mother, which I think is sufficient. I allow the line for him on the east side to be along a new post fence on the west side of the creek crossing the creek at the head of said fence, and running to a ditch from *Preston's* line, and all the land north of that ditch, that I bought of *Whitting*, I leave to *John*, and the right of water bought of *Townsend*. I leave to John my farming utensils, furniture, timber, wheels, (my wardrobe to my grand-daughter, *Mary W. Jones*,) the line at the south end of the above named fence, to due south to the middle of the road leading to *Wilmington*, past *Osmond's* factory, thence down said road to the line of *Osmond*, then crossing the creek to my land that I bought of *Russell*, which is to be the boundary between them.

and both equally to support the fence and clean out the ditch, and if *John* marries, and has children, *Benjamin* to make *John* a title for his half of his mother's land, which is a condition of this, my will, still *John* to have the use of *Benjamin's* half of his mother's farm, according to the above described bounds, the above post fence ends at an ash tree, which I make the corner, thence south-east to a gum that the log on the *Mercer* creek is chained to, from thence the same course to a small hickory near the road, marked, the limbs hanging down, from thence to the middle of the road, and then as described as above, I make the above a *sine qua non*, and if either attempts to break it, is to have no benefit to my estate, but all to go to the one willing to fulfill. I likewise constitute my son, *Benjamin W. Jones*, my sole executor."

This will was executed in the presence of two witnesses, and, therefore, not capable of passing real estate in *Maryland*. The devisees, *John* and *Benjamin*, were the only heirs at law of the testator, upon whose death letters testamentary were granted to the latter, and *John* took possession of the real and personal estate in *Pennsylvania*, given him by the will.

On the 22nd of July, 1846, *Benjamin*, the appellee, filed his bill in chancery, charging, in substance, that the defendant, *John*, claims all that the will gives him, and that he is, in addition, entitled as heir at law to an equal share of the lands in *Maryland*, of which he insists the said testator died intestate, by reason of the execution of his will in the presence of two witnesses only. That defendant acting upon this view of his rights, has recently cut down and carried away from the land in this State, timber and ornamental trees, and is now committing other acts of waste to the irreparable injury of the property, against which acts the complainant asks relief by injunction, and further prays, that if defendant be not considered as having already made his election, by taking possession of the property devised to him by the will, he be now put to his election, and for general relief. An injunction was accordingly granted.

The answer of the defendant admits that he had taken possession of the lands devised to him in *Pennsylvania*, but in-

sisting upon the great inequality in the value of the property given to him and complainant by the will, maintains that the will is restricted, and was by the testator intended to be restricted in its operation to his *Pennsylvania* property.

Proof was then taken, which it is unnecessary to state, as the questions decided relate exclusively to the construction of the will.

The chancellor (Johnson,) on the 28th of December, 1847, passed a decree ordering the defendant to proceed to his election, whether he will hold said real estate situated in this state, as heir at law of the testator, or not, within sixty days after service of decree upon him.

Accompanying this decree, the chancellor delivered an opinion, in which, after stating the facts of the case, he says:

"I am fully convinced that the testator intended to dispose of his whole estate, wherever it might be situated, and that there is nothing upon the face of the will by which his *Maryland* property can be exempted from its operation, rather than that which is situated in *Pennsylvania*. No inference of a contrary intention, I think, can be drawn from the circumstance, that the will, though good as to the lands in *Pennsylvania*, is defectively executed as to lands here, because it is manifest from the paper itself, that it was drawn without the assistance of counsel, or of any one likely to know the difference between the law in the two States, in regard to the execution of wills. I am, therefore, of opinion, that the testator did not mean to die intestate of any portion of his property.

But the will not being so executed as to pass lands in *Maryland*, is inoperative in respect to such lands, and the defendant would be entitled as heir at law to a moiety of such land, unless he is precluded by the doctrine of election from asserting his title, and this is the remaining question to be considered. There can be no doubt that, in order to impose upon a party claiming under a will the obligation to elect, the intention of the testator must be expressed or clearly implied upon the will itself, and if the obligation to elect depend upon the disposition by the testator of that which was not his own, it must plainly

appear, that he intended to make such disposition, and also that the person taking a benefit under the will, should take under the condition of giving effect thereto. 2 *Roper on Leg.*, 389.

Upon the face of this will, there can, I think, be no doubt that the testator did intend to dispose of property which he had no right to dispose of. He first describes the land which *John* is to have, and then says, "if he marries and has children, *Benjamin* to make *John* a title for his half of his mother's land, which is a condition of this my will; still *John* to have the use of *Benjamin's* half of his mother's farm, according to the above described bounds." It, therefore, clearly appears upon the face of the will, that the testator undertook to dispose of that which was not his own; and the clause in which he says, "I make the above a *sine qua non*," &c., shows too plainly for dispute, that he intended that all who took any benefit under the will, should take upon condition of giving full effect thereto.

If, therefore, this will had been properly executed to pass real estate in *Maryland*, there can be no doubt that all who took benefits under it, must have submitted to its dispositions throughout. But it is said, that a will not executed so as to pass real estate, will not put a devisee to his election, an instrument of that description not being regarded as a will at all. There seems to be a difference between the effect of an unattested will, which merely professes to devise real and personal estate, and a similar will, which gives pecuniary legacies upon the express condition that the legatee shall give up real estate, by the will attempted to be disposed of. In the latter case, the legatee will be put to his election, though in the former he would not; as if the will contains a mere devise of real estate, and bequests of personal estate, unaccompanied by conditions, the will, if not attested, could not be read as to the real estate. *Carey vs. Askew*, 8 *Ves.*, 492. *Sheddon vs. Goodrich*, *ib.*, 481.

But if there be an express condition, that any legatee who may not comply with its terms, shall forfeit all benefit under it, there the heir being a legatee, will, by force of the condition,

be obliged to make his election. The case of *Boughton vs. Boughton*, 2 *Ves. Sen.*, 12, is express to the point, and is not only believed never to have been shaken, but the doctrine established by it, appears to me so strongly recommended by natural justice, that no disposition is felt to depart from it.

The Court of Appeals of this State, in the case of *McElfresh vs. Schley and Barr*, 2 *Gill*, 181, say, "there never could have been a doubt of the power of a testator to annex what condition he pleased to his estate; and that the principle established by the cases is, that no one shall be permitted to take under an instrument, and defeat its provisions." And in the same case, when speaking of void wills, either on account of the incapacity of the testator, or the want of attestation, according to the statute, they remark, "that such instruments create no case of election by implication." But I presume there can be little or no doubt, looking to the reasoning of the court throughout the entire opinion, that effect would have been given to an express condition, even in the case of a will not attested, as required by the statute. The case in the Court of Appeals also decides, that the doctrine of equitable election is as applicable to the heir at law, as to any other devisee.

But before a party can be considered to have made an election, it must be shown that he possessed full knowledge of his own rights, and of the circumstances of the testator; and as I am not satisfied in this case, that the defendant, *John*, had full knowledge of all the facts which might have influenced his judgment, I will not hold him actually to have made his election, but will pass a decree requiring him in some reasonable time to elect whether he will take under the will, or his moiety as heir at law of the land in *Maryland*."

From this decree the defendant appealed.

The cause was argued before CHAMBERS, SPENCE, MAGRUDER, MARTIN, and FRICK, J.

By OTHO SCOTT, for the appellant, and
By MCLEAN, for the appellee.

FRICK, J.. delivered the opinion of this court.

The controversy in this case arises under the construction of an instrument of writing purporting to be the will of *Evan Jones*, in which the testator undertakes to dispose of the lands of his wife upon conditions, which it is claimed impose upon the devisee, one of his heirs, the obligation to confirm to the other a devise to him of "all the testator's (own) estate, real, personal and mixed." It was presented in the court of chancery, by the appellee, as a case of election, and the chancellor having so treated it, the present appeal is from his decree to the Court of Appeals.

The testator was a citizen of *Pennsylvania*, and the will in question was executed in the presence of *two* witnesses, conformable to the laws of that State, and admitted to be valid and operative, to pass the property of the testator there. But he had also other lands in the State of *Maryland*, upon which, for want of proper attestation under the laws of this State, the will could not operate, unless under certain conditions therein, which, it is contended, impose an election on the parties, and give effect to the will, in regard to its action upon the lands in this State.

The intention to raise an election must be clear and manifest from the will itself. That intention must be collected from the face of the instrument, and without a clear and express manifestation, it cannot be presumed to extend to property which did not otherwise pass under it. If the will is susceptible of a construction that does not require it, then, by reason of its imperfect execution here, it is not a case where the party can be put to his election as to the property in this State. This instrument, in the first instance, may seem to indicate, on the part of the testator, an attempt to dispose of the whole of his property. The first clause is: "*I give and bequeath to my son Benjamin, all my estate, real, personal and mixed, with the following exceptions.*" These general terms would necessarily pass all which the testator had power to dispose of. But it must be by an instrument perfect in all the conditions which the law requires, to make it operative. To pass lands in *Mary*

land, required the presence of *three* witnesses at its execution; and as owner of such lands, the testator must be presumed to know the laws that regulate the disposition, and constitute a valid devise of it. As it stands, it could so far pass no other than lands in *Pennsylvania*, where, in point of statutory execution, it is adequate to that purpose. As to the lands in *Maryland*, he died intestate, unless the further provisions in the will, by manifest and clear intention, express such conditions as impose on one of the heirs, by his election in *Pennsylvania*, to release to the other the lands of the testator in *Maryland*. And in the case of an imperfect will, such condition cannot be raised by implication.

What, then, are the conditions of this will, so far as they are susceptible of analysis, and of being extracted from the confused repetition and transposition of the views of the testator? He had one other son, *John*, the appellant, and to carve out an estate for him, he devises lands in *Pennsylvania*, adjoining his own, and held by him in right of the mother, to *John*, and says: "*If John marries, and has children, Benjamin is to make John a title for his half of his mother's land, which is a condition of this, my will.*" He had before given to *John* "the improvements on the farm belonging to his mother," and established a "line of boundary between them," (the brothers;) which allots to *John*, with a very slight exception, the whole of the mother's lands, and then imposes on *Benjamin* the condition stated, to make to *John* a title to his share thereof. This condition is imposed on *Benjamin* exclusively, who, under the general devise, took all the testator's land in *Pennsylvania*, at least, and which, as is in proof, was far the larger portion of the whole property. But can this condition, from its terms, and in connection with its immediate antecedent, be stretched beyond the express limitation and import of it, to make to *John* the title there directed? To this, by every sound rule of construction, it must be restricted; and so far, we find no express condition on *John* to do any act but the one mutual between the brothers, to preserve the ditch and fencing.

The testator then proceeds, "*John* to have the use of *Ben*

jamin's half of his mother's farm, according to the above prescribed bounds;" and after recurring for the third time for additional certainty, to the division line, he says: "I make the above a *sine qua non*, and if either attempts to break it, is to have no benefit of my estate, but all to go to the one willing to fulfil." Construed as a condition to what here precedes it, we have another stipulation prescribed to *Benjamin*, alone, to leave *John* in the possession of the mother's property, and an obligation on both, not to break the line established by the will. If either attempt to break this last division line, or *Benjamin* disturbs the possession in *John* of the mother's property, he forfeits all benefit under the will. To these clauses immediately following the first condition, this *sine qua non* must be restricted. To extend it beyond, and apply it to *all* the component parts of the will, would be to enlarge its terms, and make an intention for the testator which is not expressed, and cannot even be fairly implied against the form of expression used by the testator. "To break *it*." Not the will certainly, or he would naturally so have expressed it; but the condition which is the antecedent to the pronoun "it," and restricted to that by the construction which we think it alone warrants.

If the general scope of this will can be gratified without including the *Maryland* lands, the presumption in favor of the heir will prevail. In prescribing this *sine qua non* condition, it is next to impossible that the testator could have had in his mind the *Maryland* property, and not so expressed it; and it is difficult to find a case raising an election, where the property operated upon has not been particularly designated, or clearly embraced or referred to in the will *Boughton vs. Boughton*, 2 *Vez., Sr.*, 12, is among the first cases in which an heir at law was put to his election under a will imperfectly executed. But there the *express* condition is relied upon. And unless such condition be expressed, the heir is not bound to confirm the devise. 1 *Jarman*, 390. 8 *Vez.* 481. If a legacy be given by a will, sufficient in its requisites to pass personal property, and which devises the realty away from the heir, to whom the legacy is given, he may take the legacy and claim the estate in

virtue of title by descent. But if the legacy be on the express condition annexed, that he shall confirm the devise, he cannot take the legacy and disaffirm the devise. 1 *Jarman*, 377. So the will of an infant being void as to realty, raises no implication, and the heir may claim both the legacy and the land devised to another by such a will. 1 *Ves., Sr.*, 278. *Jarman*, 389. And so also with regard to the will of a *feme covert*. 9 *Ves.* 370.

If, then, there be no express condition upon *John* to convey this *Maryland* property to *Benjamin*, we are not at liberty to imply it. The intention to make such a condition, and raise a case of election, must plainly appear (as we have seen,) on the face of the will. We must be sure that it was the testator's intention to include these *Maryland* lands in his will; and wherever the devises rest upon condition, nothing is to be left to interpretation, but it must be clearly expressed.

We find a condition upon *Benjamin*, that he should convey to *John*, in the contingency mentioned of *John's* marriage, and the birth of a child, and this conveyance *Benjamin* has executed. We find further, that the possession in the meantime, in *John*, of the mother's property, and the acquiescence of both in the line of boundary established between them, is another condition in the will; and that *John* is in possession, and no controversy exists about the lines.

Thus far the disposition of the testator, as to his property in *Pennsylvania*, seems to be gratified; or if otherwise, it becomes a subject of the consideration of the proper *forum* in that State, and not in *Maryland*. Upon a careful examination we can find no condition that requires of *John* to convey his interest in the *Maryland* lands to *Benjamin;* and without such condition it cannot be said, that a will otherwise inoperative in this State, can impose upon him an election here, between the lands devised to him in *Pennsylvania*, and his rightful inheritance in this State. A will of lands that is not executed and attested according to our statutes, can create no election as to lands here, *from implication;* for the reason given, that such an instrument is no will here, and, therefore, inoperative. What-

ever may be its construction and effect in *Pennsylvania*, it cannot operate to divest either party of his inheritance here, or put him to his election. There is no such express condition in this will, and we cannot, as before said, imply it.

Finding nothing, therefore, in this will of *Evans Jones*, that can impose upon *John* a release of his claim upon the lands, or to make his election in *Maryland*, we are compelled to reverse the decree of the chancellor.

DECREE REVERSED.

ELIZA M. KIDDALL *vs.* WILLIAM TRIMBLE, SURVIVING EXECUTOR OF JANE JACOB.—*December*, 1849.

A husband died in 1809, seized of real estate, of which his widow was dowable. In 1841, the widow filed a bill to recover her proportion of rents and profits, against the executor of the party who had received them from 1809 to 1837. No person bound to assign dower was made defendant, and she had never recovered dower at law or in equity, and made no demand for it in this bill. No demand for dower had ever been made by her, until 1838, when she sued at law for the same rents and profits claimed in this bill, and in that suit the verdict and judgment were against her. No excuse for this delay was given, except the allegation in the bill, that "she was not apprised of her rights until after the death, in 1837, of the party who had received said rents and profits. She had, also, in 1839, assigned, by deed, all her dower interest to a third party. HELD: that she could not recover.

If there were no other objection to it, this would be regarded as a stale demand, a demand too recently set up to be established in equity.

If a widow has recovered dower at law, she may afterwards sue in equity for her proportion of rents and profits. So if a widow dies pending her suit for dower, equity will allow rents and profits to her administrator.

But if a widow, herself, consents to take dower without receiving her proportion of rents and profits, she can never afterwards recover them.

It would be difficult to decree rents and profits in this case, without questioning the correctness of the decision in *Steiger's Adm'r, vs. Hillen*, 5 *G. & J.*, 121.

APPEAL from the *Court of Chancery*.

The appellant filed the bill in this case on the 2nd of November 1841, to recover, a proportion of the rents and profits of certain real estate, in which she claimed dower, upon the allegation that her former husband, *William J. Chase*, died seized thereof.

The facts of the case charged in the bill admitted in the answer, and by agreement of parties, are these: *William Jacob*, the grand-father of said *Wm. J. Chase*, died on the 15th of July, 1804, intestate, seized in fee of the property in question, leaving a widow, *Jane Jacob*, the testatrix of the appellee, and three grand-children, his sole heirs at law, viz: 1st. Said *William J. Chase*, who died in 1809, having previously, in 1807, intermarried with the appellant, by whom he had one child, a daughter, who died in 1819. 2nd. *Anne Chase*, who married and died, leaving one child, now living. And 3rd. *Maria Chase*, who married and died before the death of her brother *William*, intestate, and never having had issue. After the death of her said husband, the appellant intermarried with *John Kiddall*, who died in 1816, from which time she has remained a widow. *Jane Jacob*, widow of said *William Jacob*, entered into possession of his whole estate upon his death, and continued until her death, on the 19th of July, 1837, taking to her own use the whole rents and profits thereof, under the mistaken idea that she had a right so to do, under the will of her said husband, and the appellee is her surviving executor. On the 9th of November, 1838, the appellee instituted in *Baltimore* county court an action on the case for money had and received, to recover of the appellee, as executor as aforesaid, the rents and profits which it is the object of this bill to recover; and on the 22nd of September, 1841, upon the plea of *non assumpsit*, the jury, under the instruction of the court, that the plaintiff was not entitled to recover, found a verdict for defendant, upon which judgment was rendered accordingly. On the 8th of April, 1839, pending this suit in the county court, the appellant conveyed by deed, for the consideration of $300, all her dower interest in the real estate of her former husband

the said *William J. Chase*, to *Mrs. Jane J. Delaroche*. The appellant has never otherwise made demand of her said dower, than by the institution of said suit at law, or the filing of this bill. Assets in the hands of the defendant were also admitted.

The bill alleges, as an excuse for the delay in preferring her claim, that complainant was "never apprized of her rights until after the death of the said *Jane Jacob*, and prays for an account of the rents and profits of said real estate, from the death of said *William J. Chase*, in 1809, till the death of said *Jane Jacob*, in 1837, and for a decree paying to her her share thereof, and for general relief.

The appellee, as surviving executor of said *Jane Jacob*, was the only defendant to this bill, and in his answer, after admitting most of the facts above stated, relies upon four grounds of defence. 1st. That the complainant, by conveying all her dower interest by the deed of the 8th of April, 1839, has transferred all her title thereto, and has no claim for the interposition of a court of equity. 2nd. That the verdict and judgment at law, in 1841, is a bar to the present claim. 3rd. That complainant having made no demand of dower from the death of her husband, in 1809, until the institution by her of the suit at law in November, 1838, and then only so far as the action thus brought was concerned, is precluded now from asserting any such demand. 4th. That the statute of limitations is a bar.

The chancellor, (Johnson,) on the 18th of February, 1848, passed a decree dismissing the bill, from which the complainant appealed to this court. The opinion of the chancellor, accompanying this decree, is reported in 1 *Md. Ch. Decisions*, 142.

The cause was argued before Chambers, Spence, Magruder, and Frick, J.

By Danels and T. P. Scott, for the appellant, and
By David Stewart, for the appellee.

Magruder, J., delivered the opinion of this court

William J. Chase, the former husband of the appellant, is stated to have died about the year 1809, seized in fee of real estate in the city of *Baltimore*.

The appellant filed this bill on the 2nd November, 1841, claiming her proportion of the rents and profits of her husband's estate, which descended to him from his grand-father, *William Jacob*, and which, it is charged, were received by his widow. Against her surviving executor the bill is filed. No person who can assign the dower is made a defendant, and the bill only asks that the rents and profits be decreed to her.

To this claim various objections have been made, and among the rest, that the appellant having assigned her right of dower to a third person, without having demanded her dower, she cannot claim, in equity, her share of the rents and profits. The bill was dismissed by the chancellor.

No doubt if the appellant had recovered her dower at law, she might afterwards have sued in equity for so much of the rents and profits as she was entitled to. So if a widow dies pending her suit for dower, a court of equity will allow rents and profits to her representatives. But if she, herself, consents to take dower, without receiving her proportion of rents and profits, she can never afterwards recover the latter. For this law, see *Steiger vs. Hillen*, 5 *G. & J.*, 121.

At law, no one, it is presumed, would insist that she could recover her proportion of the rents and profits. If she cannot at law, how can she claim them in equity? "There have been doubts" says *Maddox*, (1*st Chy. Practice*, 242,) "as to the principle on which equity first interfered in cases of dower, in being *a mere legal demand.*" And all the writers seem to suppose that her title to equitable relief is owing to the difficulties under which the widow labors at law. Having *thus* possessed itself of jurisdiction in the case, chancery goes on to decree an account of rents and profits.

The right to rents and profits, or damages for withholding dower, is also a legal claim, being given by the *Statute of Merton*, and recoverable at law. And it is by no means clear, when chancery first undertook to decree the rents and profits, on what

the equity was founded, unless as *Park*, in his work on dower, ch. 15, suggests, "the claim of arrears involved a species of account, and the court having thus obtained a jurisdiction of the subject, would proceed to decree complete relief."

A widow, framing her bill correctly, may demand in chancery, dower in any lands of which her husband was seized during coverture, provided she makes the demand of the person who is bound to assign that dower to her. But no such person is a party to this suit, and no such demand is made. All that she asks for is, that her share of the rents and profits be paid by the executor of the person who, she alleges, held the land until her death.

If, in this suit, chancery can decree rents and profits, later rents and profits may be claimed in a subsequent suit, and thus her right of dower will enable her, and those claiming under her, to treat the heir as a tenant.

It will not be affirmed that this case, and that of *Steiger's Adm'r, vs. Hillen*, (*5 G. & J.,*) are precisely alike. It would be difficult, however, to decree rents and profits in this case, without seeming to question the correctness of that decision.

The complainant in this case neither asked for dower, nor had established or obtained her dower elsewhere. It is possible that if she was to claim it, and, of course, made the person who had an interest in, and the means of contesting her right of dower, she might fail in establishing it. Surely rents and profits ought not to be decreed, while it is yet uncertain whether she ever had a right of dower.

In the case of *Steiger's Adm'r, vs. Hillen*, this court said: "After the lapse of twenty-five years from the inception of title, a delay entirely unexplained, and without any claim whatever in the intermediate time being made, it would seem to be against policy and convenience to allow the commencement of a controversy for rents and profits." In the case before us, there was an interval of more than thirty years between the death of the husband and this application. The husband of the complainant died in 1809, and this bill was not filed until 1841.

The complainant, it is true, according to the paper of admis-

sions, instituted an action at law to recover these rents; but the result of that suit cannot, in any way, benefit her in her efforts to recover them in equity.

Every thing stated as above, in *Steiger vs. Hillen*, is equally true in this case, except it be, that there "the delay was entirely unexplained." Here we are told, in the bill of complaint, "that she (the complainant,) never was apprized of her rights till after the death of the said *Jane Jacob*." Such allegations are very usual in bills, but do not seem, of themselves, to furnish sufficient excuse for unreasonable delay in the assertion of legal rights. Did it proceed from her ignorance of the right of a widow to dower in lands of which her husband was seized during the coverture? From her ignorance of the persons to whom she was to apply, in order to have dower assigned to her? Of such ignorance as this, if explicitly stated, she could not avail herself, because the great object in selecting chancery as the tribunal from which she is to obtain relief, is, that there she is supposed to be "able to ascertain the lands out of which she is dowable, and the persons against whom to bring her writ." But the conveyance by her of her right of dower, shows that she did not *immediately* file her bill, and the paper of admissions shows that she was seeking relief elsewhere.

Jane Jacob died in 1837, more than six years before the filing of the bill.

William Jacob, it is admitted, died seized in fee of the land. His widow, then, we have a right to suppose, was entitled to dower. It was not the fault of *Jane Jacob*, that the complainant, if entitled to it, did not obtain her dower. Complainant's husband, according to the paper of admissions, was entitled to an undivided third part of this land, and subsequently, upon the death of a sister, to an undivided moiety; the widow of *Jacob*, the whole time, and until her death, having a right of dower therein. The complainant, in her bill, states that she, herself, "after the death of her husband, intermarried with one *John Kiddall*, and that he died about the year 1816." The rents and profits to which his wife was entitled, he was authorised to demand, and may have received, though the evidence

of the payments to him, may not, after the lapse of more than twenty-five years, be within the reach of the present defendant, (appellee,) who is not to be presumed to have had any knowledge of the claim, or the manner in which, at any time, it was satisfied.

Upon the whole, this seems to be what the law pronounces to be a stale demand, a demand too recently set up, to be established in equity, even if there did not exist other objections to it, and we do not think that the chancellor erred in dismissing the bill.

DECREE AFFIRMED.

William D. Wilson *vs.* Henry D. Guyton.—*December*, 1849.

The finder of lost property, for the restoration of which the owner has offered a fixed or certain reward, has a lien on the property, and may retain possession of it, if, on his offer to restore it, the owner refuses to pay the reward.

But, where the offer of the owner was merely to pay "a liberal reward," it was Held: that there was no ground for the implication of such a lien.

The doctrine of lien is more favored now than formerly, and it is now recognised as a general principle, that wherever a party has, by his labor and skill, improved the value of property placed in his possession, he has a lien upon it until paid.

Liens are implied when, from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from circumstances, that it was the understanding that they should exist.

The existence of liens has been sustained when they contribute to promote public policy and convenience.

Appeal from *Harford* county court.

This was an action of *replevin*, instituted by the appellee, for the recovery of a horse which had strayed from the posses-

sion of the plaintiff, and had been taken up by one *William H. Pearce*, and was retained by the defendant as *Pearce's* agent. The plea was *non cepit*.

At the trial, the defendant proved that the plaintiff was the owner of the horse in question, and that having lost said horse in the month of July, 1847, the plaintiff offered a liberal reward, by advertisement, to any one who would take up said horse, and deliver him to the plaintiff; and that said *Pearce*, after said advertisement, and in consequence thereof, took up said horse, and offered to deliver him to the plaintiff, upon said plaintiff's paying $3, as the reward for such taking up. He also further proved, that plaintiff admitted that the sum of $3 was a reasonable reward, and within the terms of the advertisement, and that defendant held said horse at the time the writ was issued in this case, as the agent of said *Pearce*. The defendant then prayed the court to direct the jury, "that unless the plaintiff proved, or offered proof that he had, before the institution of this suit, paid the said $3, the reward aforesaid, or tendered or offered to pay the same, the said plaintiff is not entitled to recover." Which direction the court (Archer, C. J., and Purviance, A. J.,) refused to give, but instructed the jury, that the said *William H. Pearce* had no right to retain said horse till the said reward was paid. The defendant excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, Martin, and Frick, J.

By Otho Scott, for the appellant, and
By H. W. Archer, for the appellee.

Dorsey, C. J., delivered the opinion of this court.

The doctrine of lien in more favored now than formerly; and it is now recognised as a general principle, that wherever the party has, by his labor or skill, &c., improved the value of property placed in his possession, he has a lien upon it until

paid. And liens have been implied when, from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from circumstances, that it was the understanding of the parties that they should exist. The existence of liens has also been sustained where they contributed to promote public policy and convenience. If any article of personal property has been lost, or strayed away, or escaped from its owner, and he offers a certain reward, payable to him who shall recover and deliver it back to his possession, it is but a just exposition of his offer, that he did not expect that he who had expended his time and money in the pursuit and recovery of the lost or escaped property, would restore it to him, but upon the payment of the proffered reward, and that as security for this, he was to remain in possession of the same until its restoration to its owner, and then the payment of the reward was to be a simultaneous act. It is no forced construction of his act, to say that he designed to be so understood by him who should become entitled to the reward. It is, consequently, a lien created by contract. It is for the interest of property holders so to regard it It doubles their prospect of a restoration to their property. To strangers it is every thing; for few, indeed, would spend their time and money, and incur the risks incident to bailment, but from a belief in the existence of such a lien. Public convenience, sound policy, and all the analogies of the law, lend their aid in support of such a principle. Nor are we without an express authority upon this subject. In *Wentworth vs. Day*, 3 *Metcalf*, 352, the supreme court of *Massachusetts* decided, "that a finder of lost property, for the restoration of which the owner has offered a reward, has a lien on the property, and may retain possession of it, if, on his offer to restore it. the owner refuses to pay the reward."

But, in the case before us, there is no ground for the implication of such a lien from the compact of the parties. There was no fixed or certain reward offered by the owner, to be paid on the delivery of his property. His offer was to pay a "liberal reward." Who was to be the arbiter of the liberality of the

offered reward? It cannot be supposed that the owner, by his offer, designed to constitute the recoverer of his property the exclusive judge of the amount to be paid him as a reward. And it is equally unreasonable and unjust, to say that the owner should be such exclusive judge. In the event of a difference between them, upon the subject, the amount to be paid must be ascertained by the judgment of the appropriate judicial tribunal. This would involve the delays incident to litigation, and it would be a gross perversion of the intention of the owner to infer, from his offered reward, an agreement on his part, that he was to be kept out of the possession of his property till all the delays of litigation were exhausted. To the bailee thus in possession of property, such a lien would rarely be valuable, except as a means of oppression and extortion; and, therefore, the law will never infer its existence either from the agreement of the parties, or in furtherance of public convenience or policy.

JUDGMENT AFFIRMED.

FREDERICK DAWSON, AND LAMBERT S. NORWOOD, *vs.* BENJAMIN H. LAMBERT, AND LEWIS MCKENZIE.—*December*, 1849.

Where there is no evidence adduced in the cause, upon which the instruction asked for, could be based, the court are clearly right in rejecting such instruction.

Where a draft was taken and held by the plaintiffs, as collateral security for their claim on which they brought suit, they are under no obligation to surrender or cancel it. They have the unquestionable right to retain it until their debt is discharged.

Appeal from *Baltimore* county court.

This was an action of *assumpsit*, instituted by the appellees

against the appellants, on the 30th of September, 1846, to recover the amount due on the following account, filed with the declaration:

Messrs. Dawson and Norwood, in account with Lambert and McKenzie.

1846.

June 16.—To invoice 775 bbls. flour, pr. *Victory*.			
Cash, June 13, - - - -			$2,941 62
" 22.—Short charge on invoice of June 16, of			
2 cp. bbls., on 409 bbls., - -			8 18
" 29.—Invoice 675 bbls. flour, pr. *Frank*.			
Cash, June 23rd, - - -			2,552 25
Interest, $2,941.62, June 13, to			
July 4, 21 days, - - -	$10 29		
Interest, $2,552.25, June 23, to			
July 4, 11 days, - - -	4 68		
			14 97
			$5,517 02

Cr.

June 16.—Our draft on *Talbot, Jones & Co.*, at 90 days, from 13		
June, due Sept. 11-14,	$3,000 00	
Less 90 days, discount, -	45 00	
	$2,955 00	
Interest, from 16 June, to 4 July, 18 ds., - - - -	8 86	
June 27.—Our draft, 1 d. s., favor ourselves, - - - -	2,553 16	
		$5,517 02
Sept. 14.—To amount of above draft,		
unpaid, - - - - -		$3,000 00
To protest, - - - - -		2 00
		$3,002 00

LAMBERT AND McKENZIE.

The declaration contains the money counts, the general *indebitatus assumpsit* counts, including a count for sundry matters properly chargeable in account, and a count upon an account stated. The plea was *non assumpsit*, upon which issue was joined.

At the trial, the plaintiffs proved, by their clerk, that early in June, 1846, *Norwood*, one of the defendants, applied to plaintiffs to purchase flour on commission for defendants, and brought a letter of credit from *Talbot, Jones & Co.*, to draw on them for a sum not exceeding $10,000; and that on the 13th June, plaintiffs bought seven hundred and seventy-five barrels of flour, and on the same day drew the following draft on said *Talbot, Jones & Co.*—

$3,000. *Alexandria, D. C.*, June 13, 1846.

Ninety days after date, pay to the order of *John Hoof, Esq.*, cashier, three thousand dollars, value received, and charge the same to account of *L. S. Norwood, Esq.*

LAMBERT AND MCKENZIE.

To MESSRS. TALBOT, JONES & Co., *Baltimore.*

Endorsed—"Pay to the order of *C. C. Jameison, Esq.*, cashier. JOHN HOOF, Cash'r."

On the face of this draft was written:

"Accepted,—TALBOT, JONES & Co."

Witness further proved, that on the 29th June, 1846, plaintiffs purchased, for defendants, six hundred and seventy-five barrels of flour, and on the same day wrote them a letter, in which they say:

"We now hand account current of our transaction up to 4th prox., balance due $2,553.16, for which we value on you this day, at one day's sight, in our own favor."

The account current, referred to, is the same as that filed with the declaration, except the last item.

The following is the draft referred to in said letter:

"$2,553.16. *Alexandria, D. C.*, June 29, 1846.

At one day's sight, pay to the order of ourselves, two thou-

sand five hundred and fifty-three dollars and sixteen cents, value received, and charge the same to account of

Your ob't servant,

LAMBERT AND MCKENZIE."

MESSRS. DAWSON AND NORWOOD, *Baltimore*.

Endorsed—"LAMBERT AND MCKENZIE."

That this draft was accepted and paid by defendants, at maturity.

The plaintiffs also offered in evidence a series of letters. The 1st, dated *Baltimore*, June 4th, is from *Hancock and Mann*, introducing *Mr. Norwood* to the plaintiffs. The 2nd, dated *Baltimore*, 11th of June, 1846, from defendants to plaintiffs, requests the latter to purchase and ship, for them, from 2 to 3,000 barrels of flour. 3rd, plaintiffs' letter to defendants, dated *Alexandria*, June 16th, 1846, informs the latter "that we have put on board of the schooner '*Victory*' seven hundred and seventy-five barrels sup. flour, which vessel sails today," and gives notice of the drawing of the draft on *Talbot, Jones & Co.*, on the 13th inst. The 4th, dated *Baltimore*, June 18th, 1846, from defendants, states that said shipment is satisfactory, requests plaintiffs to continue their purchases, and informs them of the acceptance of the draft of *Talbot, Jones & Co.* The 5th, from plaintiff, is dated the same day as the preceding, at *Alexandria*, and incloses invoice of said seven hundred and seventy-five barrels, and says: "Let us hear from you how far we shall go, and limits. We shall not be able to draw on *Messrs. Talbot, Jones & Co.*, at ninety days, for over $5,000, the balance must make at thirty and sixty days. The banks are unwilling to take paper at ninety days." The 6th, dated 19th of June, 1846, is from defendants, and after acknowledging receipt of invoice they say: "We should like you to go on and purchase, for us, the three thousand barrels, as desired, but would not wish the bills to be drawn at a shorter time than ninety days, and hope you may be able to arrange it on this time." The 7th, dated June 22nd, 1846, is from plaintiffs, and after noting a mistake in the previous invoice of two cents per barrel, on four hundred and nine barrels, says:

"To day we have purchased, for you, the further quantity of six hundred barrels, now on board the canal boats." The 8th is from defendants, dated June 25th, 1846, and states that the the error has been noted and corrected, and that the further purchase is satisfactory. The 9th, dated June 29th, 1846, is from plaintiffs, inclosing invoice of six hundred and seventy-five barrels, and account current, before referred to, and apprizes the defendants of draft upon them at one day's sight, for balance of $2,553.16. The 10th dated June 30th, 1846, is from defendants, and states: "We are in receipt of yours of yesterday, and have to-day accepted your draft for $2,553.16, against invoice of six hundred and seventy-five barrels of flour, which you will please ship to *New York*, at as low a freight as possible." The 11th, dated July 10th, is from plaintiffs, and incloses bill of lading of six hundred and seventy-five barrels, "per packet schooner '*Frank*,' which sails to-day," &c. The 12th, and last, is as follows:

Alexandria, Sept'r 15th, 1846.

Messrs. Dawson and Norwood, Baltimore:

Gentlemen,—Our draft on *Messrs. Talbot, Jones & Co.*, of your city, drawn on the 13th of June last, at ninety days date, and due the 14th inst., for the sum of three thousand dollars, is returned to us, protested for non-payment, the same being for purchase of flour on your account. We hold you accountable to us for the payment of the same.

Yours, LAMBERT AND McKENZIE.

The plaintiffs further proved, that the said draft on *T., Jones & Co.*, was not paid at maturity, but was duly protested. The plaintiffs' clerk further testified, that said draft was discounted by the *Mechanics Bank of Alexandria*, and was not taken up by plaintiffs until after its maturity, but before this suit. Plaintiffs further stated that they held such draft and refused to give it up at the trial, but produced it as evidence. Plaintiffs further proved, that the draft of 13th June, 1846, was not forwarded to *Baltimore*, where *Talbot, Jones & Co.* resided, until the 20th day of June, 1846, and was not accepted until 22nd

June, 1846, and that by the course of said mail, plaintiffs could not receive the letter from defendants, dated 18th June, 1846, until the morning of the 19th June, 1846, and that plaintiffs mailed their letter, dated 18th June, 1846, on same day; and that at the time of the bargain for the purchase of the flour, nothing was said by *Norwood*, or by plaintiffs, or either of them, that the acceptances of *Talbot, Jones & Co.*, would be taken in payment of the flour, or in extinguishment of all claims against *Dawson & Norwood*.

The plaintiffs then prayed this instruction: That if the jury find that the flour in question was sold and delivered by plaintiffs to defendants, and that, according to the contract between the parties, the defendants were to be liable for said flour, then the plaintiffs are entitled to recover; notwithstanding they further find, that the plaintiffs, in pursuance of a previous understanding with defendants, drew the draft of the 13th June, 1846, on *Talbot, Jones & Co.*, and the same was accepted; provided that they find that said draft was protested for non-payment, and is now in the possession of the plaintiffs.

And the defendants prayed the following instructions:

1st. If the jury believe that plaintiffs sold and delivered the flour in question to *Dawson and Norwood*, for the draft drawn by them on *Talbot, Jones & Co.*, and that so soon as they drew the same, had it discounted at a bank in *Alexandria*, or elsewhere, and did not come into possession thereof, until after its maturity.

2nd. If the jury find that the plaintiffs sold to defendants the property sought to be recovered in this case, and received in payment thereof, the draft, aforesaid, on *Talbot, Jones & Co.*, then plaintiffs cannot recover of said *Dawson and Norwood* until it shall be delivered up, to be cancelled.

Which prayer of the plaintiffs the court (Le Grand, J.,) granted, and rejected both of defendants prayers. Whereupon the defendant excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, Martin, and Frick, J.

GLENN, for the appellants.

The plaintiffs' prayer is defective in essential particulars: 1st. That the question whether notice to *Dawson and Norwood* of such protest was given in reasonable time, is not submitted to the jury; and 2nd. That the prayer nowhere asks the jury to find that any demand of payment was made of *Talbot, Jones & Co.*

There is no event in which defendants can be liable in a higher sense than as endorsers of this note; and if they were endorsers, the plaintiffs must prove:—1st. A demand of payment on *Talbot, Jones & Co.* on the day the draft fell due; 2nd. A notice of non-payment sent to the endorser, by a party interested, in a reasonable time after such demand made, and refusal of payment.

The only evidence of a demand is this: "That said draft was not paid at maturity." Now, this is true of every draft, though not presented at all.

2nd. It is not asked of the jury to find that *Dawson and Norwood* received notice after dishonor of the bill in any reasonable time, and beside which there is no evidence that any notice was ever sent them.

Again, it appears this draft was parted with by plaintiffs; being discounted for them, and not recovered by them till after its maturity. Now in *Glenn and Smith*, 2 *G. & J.*, 509, the chief justice says: "The acceptance of a note or bill of a third person for a pre-existing debt, is a payment if the creditor parts with it." One of the cases cited was 11 *Gill and Johnson*, 416, in which *Chief Justice Archer* says: "The notes are not an extinguishment of a debt, and need not be produced;" but he speaks in reference to that case, which was not an action for goods sold and delivered, but an action for a deceit, in giving a party a false credit where the production of notes was of no importance to defendant whatever; and the chief justice also says, that where notes are given by the purchaser, said notes must be produced for his security.

Beside this, the evidence all shows that defendants were not to be liable for this draft or the flour. It is drawn by plaintiffs

on *Talbot, Jones & Co.*, in pursuance of a letter of credit to *Lambert S. Norwood*. The draft is drawn on *Talbot, Jones & Co.*, and they are directed to charge that amount to *Norwood* alone. If *Dawson and Norwood* are liable to plaintiffs, they are liable to *Jones* also, and thus a double responsibility arises from one transaction. The prayer is therefore defective for this reason.

In the next place, the court rejected the defendants' prayer, asking, that before plaintiffs can recover on their original contract, they shall surrender the draft which they hold. What is the result? Plaintiffs have two securities for the same debt, where certainly but one was intended to be given. If defendants had been drawers of the draft, and plaintiffs had attempted to recover under the original cause of action, they could only do so by surrendering at the trial the bill or note to be cancelled.

In *Glenn vs. Smith, page* 508, *Buchanan, C. J.*, says: "Acceptance by a creditor of debtor's note for an antecedent simple contract debt, does not extinguish the original debt if the note remains in the hands of the creditor unpaid, *and he can produce it to be cancelled*, or shew it lost. But he will not be permitted to recover on the original cause of action, unless he can shew it lost, or *produces it at the trial to be cancelled.*" In 6 *Harris and Johnson*, 170, *Judge Stephens* says, "the note of a third person does not extinguish a simple contract debt, but he must produce it at the trial to be cancelled;" and he further proceeds to say, "that where the dealings shew the credit given to one alone with a knowledge of the other parties, you cannot turn round when you find you have misplaced your confidence and look to a different person for payment, whom you declined to take in the first instance."

In 2 *Gill*, 462, this court determined a receipt less strong than the one at bar *to be a payment*. 5 *Johnson*, 73, in *Tobey vs. Barber*, the court say, "taking debtor's note, or that of a third party, is not payment unless so agreed; but plaintiff must *return it* when dishonored, to recover on original consideration," putting both cases on the same footing.

Chitty on Bills, edition of 1842, *page* 180, in notes where

the whole of the *American* cases are collected, sums up the rule to be: "The acceptance of a negotiable note on account of a prior debt, is so far evidence of satisfaction, that no recovery can be had for such debt, without *producing the note and cancelling it;* and this applies as well to note of debtor as of third persons; and with reference to note of third persons, plaintiff must show he was guilty of no laches."

8 *Cowen*, 77, *Hughes vs. Wheller*, sanctions the same doctrine of cancelling the note to recover on the original cause of action.

The principle of all these cases is, that plaintiffs can have but one string to their bow: they cannot hold *Jones*, and thus diminish *Dawson* and *Norwood's* estate, and hold them also. This note is or is not a payment, at plaintiffs' option: if they say it is not, they must return it to the parties upon whom they want to fix a debt. There is no evidence to show it was received as collateral security; not a word of the kind: the letters, the accounts, show it was received in payment and not as collateral; the word or idea is not suggested in any part of the intercourse of the parties, and the court cannot intend or imagine it.

R. J. Brent, for the appellees.

It will be observed, that the defendants' letter of 18th June, asserts falsely that the draft on *Talbot, Jones & Co.* had been duly honoured on presentation, when, in fact, it had not been sent on by the *Mechanics Bank of Alexandria*, who had discounted it. And it will be further observed, that plaintiffs' letter of 18th June, showing that the vessel with the flour had sailed, was written and mailed on that day, before they could have known that the draft on *Jones & Co.* was accepted, thus clearly evincing that they shipped this flour on the credit and liability of defendants.

It will thus appear that the accounts, as uniformly made out, charge the defendants as the *parties responsible:* that there was but one draft on *Talbot, Jones & Co.*, the next being on defendants; that the plaintiffs blended both of these shipments in one account against the defendants, who *recognised* its cor-

rectness at the time, and paid the draft on them for part of the account. That there is no distinction in the evidence between the two shipments, save in the fact, that for the first, plaintiffs drew a draft on *Talbot, Jones & Co., on account of L. S. Norwood*, as the draft shows. And finally, that there is no privity shown between plaintiffs and *Talbot, Jones & Co.* as contracting parties, until the acceptance of the draft on *22nd June*, 1846, prior to which the shipment was made, for the *letter of credit* given by *Talbot, Jones & Co.* was to *Norwood*, and could not be said to authorise any one else to draw on *Talbot, Jones, & Co.*

The substance of the transaction therefore is this, that the defendants employed plaintiffs to buy flour for their account, and to give themselves credit, showed the letter of credit held by them. That the plaintiffs, for the first shipment on account of defendants, drew the draft on *Talbot, Jones & Co. on account of Norwood*, and doubtless by his request, he undertaking to procure *Jones'* acceptance.

But this acceptance was never taken in satisfaction; and so far from evidence to establish such a defence, all the facts negative the theory.

When the flour was bought and shipped, defendants had given absolutely nothing to plaintiffs. On whose credit then could the flour have been shipped but the defendants? Could it be that plaintiffs shipped the flour on the 16th June, on the credit of *Jones*, who had then contracted no obligation with them? And who, in fact, did not accept until 22nd June.

If, therefore, it is obvious that the flour was shipped by plaintiffs on the 16th June, and sent away before they had heard, or *could have heard*, of *Jones'* acceptance, is it not conclusive to show that the shipment was on the credit of defendants? so understood and regarded always by both parties in their correspondence.

Jones' acceptance, when afterwards obtained, was therefore but collateral security, a *mere credit when paid*, as the account current shows.

The questions on the prayer of plaintiffs are simply these:

"If the jury believe that the flour was sold, and delivered by plaintiffs to defendants, (a pure question of fact,) and that according to the contract between the parties, the defendants *were to be liable for said flour*, then the plaintiffs are entitled to recover, notwithstanding" the other facts.

The whole evidence being parol, it was the province of the jury to find the contract between the parties, and the prayer is based on the assumption, simply, that *if the jury find the sale and delivery*, and that defendants were *to be liable by their contract*, then the plaintiffs must recover.

Observe that the prayer does not leave it to the jury to say, what constitutes a liability, but only if they find that by the contract, defendants were *to be liable*, meaning evidently that if *credit was given to defendants*, &c., then plaintiffs must recover upon the sale and delivery.

To whom credit was given, is a question for the jury. See 7 *Har. & John.*, 391, *case of Elder vs. Warfield.*

And so who was intended or meant to be liable by a parol contract, is equally a question of fact. 1 *Greenleaf Ev., sec.* 277, *Note* 1.

But if it were a question of law and fact, a mixed question, this prayer only assumes, that "if the jury finds the defendants *were to be liable*," of which liability there was abundant evidence for the consideration of the jury. 6 *G. & J.*, 63.

If right in this view, then it follows that the right to recover, was a corrollary from the premises, provided the jury find the draft was protested, and was in possession of plaintiffs, unless indeed, the surrender of the draft to be cancelled was necessary, as set out in defendants' prayer, which we deny; because, if drawn and accepted as collateral, we have a right to retain it until paid our debt, and no prejudice can result to defendants by a double recovery, inasmuch as on the trial the draft was in our possession, *overdue and dishonored.*

There must be a clear agreement to take the acceptance of a third party, as absolute payment. *Johnson vs. Weed.* 9 *John.*, 310. *Glenn vs. Smith*, 2 *G. & J.*, 493. 7 *Har. & John.*, 17.

To show that it is not necessary to cancel the acceptance. See *Wyman vs. Rae*, 11 *G. & J.*, 416.

The prayers of the defendant were refused rightfully, if these views are correct; and, moreover, are so worded as to amount to one prayer, containing propositions inconsistent with each other: for instance, that if the draft was received in payment, then it must be surrendered.

MARTIN, J., delivered the opinion of this court.

After a careful examination of the facts detailed in this bill of exception, we think it clear, that there was testimony from which the jury could find that the draft of the 13th June, 1846, was drawn by the plaintiff, and held by them after its acceptance by *Talbot and Jones*, as collateral security for the payment of the flour sold and delivered by them to the defendants. And that there was no evidence adduced in the cause from which the jury could infer, that the draft in question was drawn by the plaintiffs, in full satisfaction of the claim sought to be recovered, or that they stipulated by their contract, with respect to this flour, that they would look to *Talbot and Jones* for payment, and not to the defendants, as the responsible parties.

Upon this ground, the court below was correct in granting the plaintiffs' prayer, and in rejecting the prayers of the defendants.

With respect to the law, in a case like this, there can be no controversy. The correctness of the rulings of the court below upon the points raised by the prayers, depends exclusively upon the question, whether there was testimony from which the jury could find that the draft of the 13th of June, was drawn and held by the plaintiffs, as absolute payment for the flour sold and delivered by them to the defendants? We think there was no such testimony.

The draft appears to have been duly protested for non-payment. It was subsequently taken up by the plaintiffs, and was in their possession at the trial. And assuming that it was held by them as collateral security for their claim, of which

there was certainly evidence for the jury, they were under no obligation to surrender or cancel it. They had the unquestionable right to retain it until their debt was discharged.

JUDGMENT AFFIRMED.

NEPTUNE INSURANCE COMPANY, GARNISHEE, *vs.* FRANCIS S. MONTELL, ADMINISTRATOR OF GEORGE HUGHLER.—*December*, 1849.

The 3rd section of the act of 1834, ch. 79, providing that no transfer or assignment of any "lands, tenements, hereditaments, goods, or chattels, or credits," shall avail against an attachment, unless recorded before the issuing thereof, comprehends *choses in action.*

The act of 1847, ch. 107, repealing the said section of the act of 1834, cannot have the effect to give validity to unrecorded assignments made before the passage of such repealing act.

An instruction that there "are circumstances of suspicion relative to the fairness of certain papers offered by the defendant, which, if said papers were fairly executed, the defendant might explain; and, from the want of such explanatory evidence, the jury may find said papers were not fairly executed," was held erroneous, because it instructed the jury that they must believe the testimony relative to the circumstances of suspicion, and leaves them in ignorance of what those circumstances are.

A party cannot complain of the granting of an instruction by which he is not injured, even though it may be erroneous.

In cases of an equal division of the court, the jury are still to give a true verdict, and are precisely in the same situation in which they would have been if no instruction had been applied for on either side.

The usual practice in cases of an equal division of the court, is for each party to ask for instructions, and to except to the refusal to grant them, occasioned by the equal division.

Appeal from *Baltimore* county court.

This was a proceeding by attachment, on warrant instituted originally by the intestate of the appellee, on the 15th of Oc-

tober, 1840, to recover the sum of $3,177.20, alleged to be due him by *Moses J. Moses*.

The plaintiff, in his affidavit before the justice who issued the warrant, swears that a certain *Moses J. Moses*, not being a citizen of the State of *Maryland*, is justly and *bona fide* indebted unto him, the said *George Hughler*, in the sum of $3,177.20, over and above all discounts, and that the said *Moses J. Moses* is not a citizen of the State of *Maryland*.

The voucher produced was the record of a judgment recovered at *Nassau*, in the island of *New Providence*, one of the *Bahama* islands, on the 5th of May, 1840, by said *Hughler* against said *Moses*, for £621 0s. 10d. damages, and £40 16s. 6d. costs. The short note upon which the *capias* was issued, is as follows:

"*George Hughler against Moses J. Moses.* Action of *assumpsit* in Baltimore county court. This suit is instituted to recover the sum of $3,177.20, due and owing to the plaintiff, for money had and received by the defendant, to and for the use of said plaintiff, and for a like sum paid, laid out and expended by plaintiff for the defendant, and for a like sum by the plaintiff lent and advanced to the defendant, and for a like sum for goods sold and delivered by plaintiff to the defendant, and for a like sum due and owing by defendant to plaintiff, on an account stated."

The attachment was laid in the hands of the appellant, who appeared and pleaded *non assumpsit* and *nulla bona* of defendant, in its hands. Upon which pleas issues were joined.

The garnishee then moved to quash the attachment, because, in the short note filed with his attachment, the amount of the plaintiff's claim is not sufficiently set out in words and figures, at length or otherwise; and further, because, in the affidavit filed, upon which the attachment has issued, the claim is upon a record of the judgment alone, and in the short note the claim is stated to be in *assumpsit*, for money had and received, &c.; but the court (MAGRUDER and PURVIANCE, J.,) overruled this motion.

At the trial, the plaintiff offered in evidence the record filed

with the attachment, admitted to be considered as duly proved, and proved that, at the time said judgment was rendered, the value of a pound currency of the *Bahama* islands, was $4.80, and that plaintiff was a citizen of the *United States*, residing in *New York*.

The defendants then gave in evidence the following letters and assignments, the handwriting of the different parties to which were admitted to be genuine:

"*Charleston*, April 29th, 1840.

Messrs. Clark and Kellogg, Baltimore:

Gentlemen:—The enclosed I have had some time in my possession, and I now forward them to you. The order on the company, in your favor, you may as well lodge with them, and I should like you to accept the order in my favor, 'payable when in funds,' and return the same to me. It may be as well to say nothing to the underwriters about the transfer of the claim to me, and let the suit go on in the name commenced.

Your obedient servant,

L. J. Moses."

"The *Neptune Insurance Company, Baltimore, Maryland*, will please pay the amount of my claim against them, to *Messrs. Clark and Kellogg*, for the loss of the schooner *Meridian*, cargo, freight, &c. M. J. Moses.

Witness, Isaac J. Moses,

Nassau, N. P., November 25th, 1839."

"*Messrs. Clark and Kellogg, Baltimore:*

Gentlemen:—When received, please pay the amount you may receive from the *Neptune Insurance Company*, for my claim against them, for loss of the schooner *Meridian*, cargo, freight, &c., to *Mr. L. J. Moses*, or order, of *Charleston, S. C.*, which I transfer to him this day, for value received.

(Signed,) M. J. Moses.

Witness, (Signed,) I. J. Moses,

Nassau, N. P., Nov. 25th, 1839."

"*Baltimore*, May 18th, 1840.—Payable when in funds.

(Signed,) Clak and Kellogg."

Neptune Ins. Co., Garnishee, vs. Montell, Adm'r of Hughler.—1849.

And also offered in evidence two policies of insurance made by the *Neptune Insurance Company*, the garnishee in this case, insuring said *Clark and Kellogg*, on account of whom it may concern, the schooner *Meridian*, from *Nassau, N. P.*, to *Baltimore*, to the amount of $2,000, and freight to the amount of $500, and proved that the same were, by the *Messrs. Clark and Kellogg*, put into the hands of *John Glenn*, attorney at law, for adjustment, in April, 1840; that the losses intended to be covered by said policies, were disputed, and that suits were brought thereon, to the November term of the circuit court of the *United States*, for the *Maryland* district.

The defendants then moved the court to instruct the jury, that if they believed the evidence offered in this cause, the plaintiff is not entitled to recover, because:

1st. He has not, either in his affidavit or elsewhere, averred that the amount for which the judgment was rendered, is equivalent to the amount charged by him in his attachment, or equivalent to any other sum of money of the *United States*.

2nd. That he has not shewn that the court, before which the judgment, as is alleged, was rendered, had jurisdiction of the subject matter decided upon by said court.

3rd. That there is a variance between the short note filed, and the evidence adduced by the plaintiff.

4th. That the short note should have been drawn specially upon the judgment.

5th. That the record filed, does not correspond with the description thereof in the affidavit filed by plaintiff, upon which the attachment was issued.

6th. That if the jury believe the assignment, as given in evidence, was made and accepted at the time it dears date, then plaintiffs cannot recover.

All which prayers the court refused to grant, and the defendant excepted.

The jury rendered a verdict for the plaintiff, and assessed the damages at $3,633.62. The defendant then moved for a new trial, and arrest of judgment, because the verdict was rendered for a larger sum than claimed by the plaintiff, and because in-

terest was calculated upon the amount of the attachment; and, as an additional reason for a new trial, the garnishee states, that the only claim or debt due by the garnishee, is a debt upon which the said *Moses* had instituted suit in the circuit court of the *United States*, for the *Maryland* district, before this attachment was issued, and in which case judgment has been rendered against said garnishee. The court overruled this motion, and entered judgment of condemnation on the attachment, for said sum and costs.

The defendant appealed, and the Court of Appeals, at June term, 1844, reversed the judgment, and remanded the cause under a *procedendo*.

Under this writ the cause was again tried in the county court, in May, 1847. *Hughler* having died in the mean time, administration on his estate was granted to *Montell*, the appellee.

Before this second trial, the following amended short note was filed by the plaintiff:

"Action on the case. In *Baltimore* county court.—This suit is instituted to recover the sum of $3,177.20, due and owing by the defendant to the plaintiff, on a judgment recovered in an action of *assumpsit* by said plaintiff, *George Hughler*, against said defendant, in the general court at *Nassau*, in the island of *New Providence*, one of the *Bahama* islands, on the 5th day of May, 1840, at Easter term of said court, and also to recover a like sum promised by said defendant to be paid to said *Hughler*, as being due to him by said *Moses*, in and upon said judgment, and also to recover a like sum of $3,177.20, due and owing by said defendant, *Moses*, to the said plaintiff, on a judgment recovered in an action of *assumpsit* by said plaintiff, *Hughler*, against said *Moses*, in the general court of the *Bahama* islands, at *Nassau*, in the island of *New Providence*, one of said *Bahama* islands, on the 5th day of May, 1840, at Easter term of said court, and for a like sum promised by said defendant to be paid to said *Hughler*, as being due to him by said defendant, in and upon said last named judgment."

The pleas and issues were same as in former trial.

At the trial, the plaintiff offered the same evidence as at the

preceding trial, and also that it is admitted that the garnishees had, at the time of laying said attachment in their hands, and now have, sufficient funds to cover the plaintiff's claim, provided it is established.

The defendant then gave the same evidence as before, and, in addition, the following letters, the handwriting of the different parties to which was admitted:

Charleston, Oct. 3rd, 1840.

John Glenn, Esq., Attorney at Law, Baltimore:—

Dear Sir:—I shall be pleased to have you inform me when the case of *M. J. Moses* against the *Neptune Insurance Company*, will come on in the *United States* court, and request you will get ready any commissions you require to be sent to *Nassau*, and send them to *Messrs. R. W. Brown and Sons, Wilmington, N. C.*, to be forwarded to *Mr. Anderson*, attorney general at *Nassau, N. P.*, by first vessel, as a vessel will be dispatched from *Wilmington* for *Nassau*, in the course of ten or twelve days, therefore it will be necessary to get your papers ready immediately, to be dispatched by that vessel, in the event of there being no opportunity at *Baltimore* to send them direct to *Nassau*. I shall be in *Baltimore* at the time of the trial coming on, and shall be prepared to arrange with you for conducting this suit. Please state whether any papers, beside what you or *Messrs. Clark and Kellogg* have, be necessary, so that I can obtain them. The captain of the *Meridian* lives at *Nassau*. Very respectfully, your ob't serv't,

L. J. Moses,
At *South-western Railroad Bank*,
Charleston, S. C.

An early reply is solicited.—L. J. M.

Charleston, 15-18 May, 1840.

Gentlemen:—I addressed you, on the 29th ulto., and enclosed an important document, without receiving any acknowledgment from you. Please inform me whether such letter,

with its enclosure, has ever reached you. Your immediate attention will much oblige your obedient servant,

L. J. Moses,

At the *South-western Railroad Bank.*

To Messrs. Clark and Kellogg,

Baltimore, Md.

Baltimore, May 18th, 1840.

Mr. L. J. Moses, Esq., Charleston:

Dear Sir:—We received, some time since, your's of 29th of April, and to-day we have your letter of 18th inst. Our attorney, *Mr. Glenn,* has been too unwell to attend to business, and, therefore, no progress has been made in your case. We annex a copy of a note which he received from the underwriters, by which you will perceive they withdraw all offers of compromise. They seemed disposed to contest every inch of ground, and, we think it probable, will endeavor to show, among other things, that the vessel was unseaworthy, from want of sufficient equipment, or of a properly qualified crew. As soon as we shall have seen *Mr. Glenn,* we will write you further. We think you should endeavor to get possession of the bals. left at *Nassau.* We enclose our acceptance of *Mr. M. J. Moses'* order on us, payable when in funds.

Your obedient servants,

Clark and Kellogg.

Evidence was also offered in relation to the *bona fides* of the transfer of his claim against the garnishees, by *M. J Moses* to *L. J. Moses,* of the 25th of November, 1839, and of other matters which it is unnecessary to state.

The plaintiff then further gave in evidence three short copies of the judgments in the suits on said policies of insurance in the circuit court of the *United States,* and orders to enter the same for the use of *L. J. Moses,* dated September, 1842. And proved, that in 1839, and 1840, it took from three to four days for the mail to come from *Charleston, S. C.,* to *Baltimore,* and that the voyage from *Nassau* to said *Charleston,* was usually made in four, five or six days, and that from *Nassau*

to *Baltimore*, was usually from eight to ten days. Whereupon, the plaintiff submitted the following prayers:

1st. That the orders offered in evidence, of the 26th November, 1839, not having been recorded before the issuing of the attachment in this case, are no bar thereto, under the act of *Maryland*, of 1834, ch. 79, sec. 3.

2nd. That even if the said orders are not a bar, for the reason stated in the 1st prayer, they are not, unless the jury find that they were given *bona fide*, and for a valuable consideration.

3rd. That the said papers, of the 25th November, 1839, did not transfer the funds attached, at the time the attachment was laid, independent of the act aforesaid, and independent of the *bona fides* of such papers.

And the defendant submitted the following prayer:

That if they find the transfer offered in evidence by the defendant, to have been executed by *Moses J. Moses*, it is *prima facie* fair, and to invalidate it, it is incumbent on the plaintiff to satisfy the jury, from the evidence in the cause, that it was fraudulently made.

The plaintiff then offered his 4th prayer:

4th. If the jury find, from the evidence of the defendant, that there are circumstances of suspicion in relation to the fairness of the papers of the 25th November, 1839, which, if the said papers were fairly executed, the defendant might explain, that then, for the want of such explanatory evidence, the jury may find that said papers were not fairly executed, notwithstanding the prayer of defendant.

And the court (Archer, C. J., and Le Grand, A. J.,) granted the 2nd and 4th prayers of the plaintiff, and the prayer of the defendant, and rejected the 3rd prayer of the plaintiff, and, being divided in opinion on the 1st prayer of the plaintiff, refused to give the instruction as therein prayed for.

To the granting of which 2nd and 4th prayers of the plaintiff, the defendant excepted; and to the refusal of his 1st and 3rd prayers the plaintiff excepted.

After the instructions in the aforegoing exception were given

by the court, and the plaintiff's counsel had addressed to the jury the opening speech on the evidence, the counsel for the defendant, in addressing the jury, asserted and insisted, that the refusal by the court to grant the plaintiff's said first prayer, amounted to an instruction in this case, that the act of 1834, ch. 79, referred to in said prayer, did not apply to this case. Whereupon he was interrupted by the counsel of the plaintiff, who denied that such was the legal effect of said refusal. Whereupon the defendant's counsel offered to the court the three following prayers:

1st. If the jury find, from the evidence, that the transfer offered by the defendant was executed by *Moses J. Moses* to *L. J. Moses*, *bona fide*, and for a fair and valuable consideration, that the same is not covered by the provisions of the act of 1834, ch. 79.

2nd. And even if within the provisions of the said act, that the same having been repealed, said transfer is valid and good.

3rd. That the court having divided on the first of the plaintiff's prayers, and on the defendant's first prayer, and exceptions thereto having been taken by both plaintiff and defendant, the question therein stated, and thereby presented, is withdrawn from the consideration of the jury.

Which second and third prayers the court rejected, and being divided in opinion on the first, refused to give the instruction therein prayed for; to which refusal to grant said prayers, the defendants excepted, and the verdict and judgment being against them, they appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, Martin, and Frick, J.

By Glenn and Nelson, for the appellants, and
By R. Johnson and John J. Lloyd, for the appellee.

The points made in argument were the same as the propositions contained in the prayers offered by the respective parties.

The 3rd sec. of the act of 1834, ch. 79, repealed by the act of 1847, ch. 107, is as follows:

"*And be it enacted*, that where any attachment, as aforesaid, shall hereafter be levied or laid upon any lands, tenements, hereditaments, goods, or chattels, or credits, of a non-resident defendant or defendants, no conveyance, transfer or assignment of any such lands, tenements, hereditaments, goods, or chattels, or credits, shall have any effect against such attachment, unless the same shall have been recorded in the office of the clerk of the county in which such attachment shall have issued, before the time of such issuing."

MAGRUDER, J., delivered the opinion of this court.

In this case an attachment was laid by a creditor of the defendant, in the hands of a person who certainly had been indebted to the defendant. It is said that the defendant, previously to the issuing of this attachment, had transferred this claim to another person. There is, however, no proof of any such assignment or transfer being recorded.

The only question is, whether the terms used in the act of 1834, comprehend *choses in action?* This question, we think, was decided by this court in a case on the *Eastern Shore, (Massey vs. Hesson and Hanlan,)* decided June term, 1845. The garnishee was indebted to the defendant on an award which the latter had assigned previously to the attachment being issued, but the assignment was not recorded, and because it was not recorded, the court decided, that the claim could be attached. We think, therefore, that the court below ought to have decided this question in favor of the plaintiff there.

We think that the court below erred in saying to the jury, "that there are *circumstances of suspicion* in relation to the fairness of the papers offered by the defendant, of 25th November, 1839, which, if the said papers were fairly executed, the defendant might explain, and for the want of such explanatory evidence, the jury may find the said papers were not fairly executed." This seems to instruct the jury, that they must believe the testimony relative to the circumstances of suspicion, and leaves them in ignorance of what are those suspicious circumstances.

The decision of this court, however, upon the former point, renders this instruction of no importance. The appellant cannot complain of it, because, by it, he was not injured. When it is settled that the assignment, whether *bona fide* or not, is of no effect in the trial of the issue, it is immaterial whether it was fairly executed or not.

Upon the first question, relative to the validity of the transfer, or the necessity of recording it, the court below was equally divided, and the effect of such equal division is to be ascertained.

The defendant contended, that the question was withdrawn from the consideration of the jury. If so, how were the jury to render a verdict? What disposition was to be made of the case? In the *United States'* courts, when an equal division takes place, the trial stops until the opinion of the Supreme Court can be had. But we have no such provision in *Maryland*. The jury are still to give a true verdict, and are precisely in the situation in which they would have been, if the counsel on both sides had declined applying to the court for any instruction.

The usual course in some of the courts of *Maryland*, is for the party who asks the instruction, which is refused, to take his exception, and then the other party may ask the court to instruct the jury that the law is otherwise than as suggested by his adversary. The equal division of the court gives to him an opportunity, also, of taking an exception, and of obtaining a reversal of the judgment, if the court erred, and he was injured by their error in refusing to give his instruction. In the case of *Smith vs. Gilmor*, 4 *H. & J.*, 177, either party, without a second prayer, may except. See 4 *Gill*, 209.

This court has already decided, in the case of *Massey*, before alluded to, and, indeed, in other cases, that the repeal of the act of 1834, had not the effect of giving validity to assignments of this description, before its repeal.

JUDGMENT AFFIRMED.

Dorsey, C. J., dissented.

ASHTON ALEXANDER AND SARAH R. ALEXANDER, *vs.* MARGARET WALTER, ANN M. WALTER, GEO. K. WALTER, AND OTHERS, LESSEE.

To make a judgment by default in an action of ejectment, a bar to a lease, and conclusive upon the rights of the tenant, under the statute of 4 *Geo.* 2, *ch.* 28, it must clearly appear that the court rendering the judgment, designed to exercise the power conferred by the statute; the affidavit of the plaintiff, required by that statute, must be filed during the term at which the judgment was rendered.

The owner of a leasehold interest in a lot of ground, in 1811, devised it by will to the appellees, the children of his daughter *M*, with directions that *W*, the husband of *M*, should receive the rent thereof. The reversion in fee of the same lot in 1814, became vested in *S R M*, one of the appellants. *W* took possession and paid the ground rent to *S R M*, up to March 1819, when he left the property. About one year after this, *S R M*, rented the lot to one *Smith*, against whom, in 1823, the rent being in arrear, she brought an action of ejectment, in which, judgment by default was rendered against the casual ejector, in March of the same year, and in February 1824, the affidavit of the plaintiff required under the statute of 4 *Geo.* 2, was filed in the case. In 1841, the appellees, who had now attained age, brought ejectment against the appellants in possession of the premises. HELD: that the proceedings in the ejectment against *Smith*, do not estop the appellants from denying *W's* possession of the premises at the time that ejectment was brought.

W not being a party to the suit against *Smith*, and having no privity or connection with the latter, who was the immediate tenant of *S R M*, but claiming the lot under the original lease, there would be no mutuality in making the proceedings in that case, an estoppel to the appellants in this.

As the appellants could not rely upon the recovery in the ejectment against *Smith*, as a bar to the right of the appellees to recover in this suit, the rule of reciprocity upon which the doctrine of estoppels stands, forbids the latter from using the same recovery as an estoppel to the former.

Estoppels must be reciprocal and bind both parties. They operate only on parties and privies in blood or estate, and can be used neither by nor against strangers.

As between the appellant and *Smith*, the former would be estopped from denying the statement in the affidavit of *S R M*, filed in the ejectment case against the latter, but *W*, the father of the appellees, and who was directed to receive the rents of the lot, was a stranger to that suit, and did not act upon, nor was he misled, injured, or deceived by the admission in that affidavit, it cannot, therefore, operate as an estoppel *in pais*, to preclude the appellants from showing in this case that they took possession *prior* to the time when the ejectment in that case was brought.

Estoppels *in pais*, cannot be pleaded, but are given in evidence to the jury, and under the direction of the court, may operate as effectually as technical estoppels.

As a general rule, a party will be precluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter; but as to third persons, he is not bound, but may show that such admissions were mistaken or untrue.

The doctrine of estoppels *in pais*, stands upon the broad grounds of public policy and good faith: it is interposed to prevent injustice, and to guard against fraud, by denying to a party the right to repudiate his admissions when they have been acted upon by persons to whom they were directed, and whose conduct they were intended to influence.

The rule in *New York*, that a possession of fourteen years is the period from which a regular re-entry at common law for the non-payment of rent, may be presumed, is entirely arbitrary, and not sustained by authority or analogy, and cannot receive the assent of this court.

Where a lease contains a clause of re-entry for non-payment of rent, twenty years uninterrupted, exclusive, notorious and adversary possession of the lessor, and those claiming under him, will, in analogy to the statute of limitations, warrant the presumption of a regular re-entry at common law.

But a prayer which omits to present the question of adversary possession, as a fact to be found by the jury, will be defective.

From analogy to the statute of limitations and the doctrine of presumptions as applied to land, a possession for a less period than twenty years, is not sufficient to warrant the presumption of a regular re-entry at common law for the non-payment of the rent reserved by the lease.

The mere docket entry in an ejectment case of "agreed," not followed by a judgment dismissing the suit, cannot have the effect to extinguish the legal title of the plaintiff in the land for which the ejectment was brought; the deduction to be drawn from it is, that each party retired from the litigation, leaving their rights precisely as they stood before the suit was begun.

The deed of the collector of the city of *Baltimore*, conveying to the purchaser, property sold under the act of 1816, ch. 171, is evidence of the *factum* of the sale; the right to convey is implied from the power to sell.

But this deed is not evidence of the regularity of the proceedings preceding the sale, and out of which the power to sell arose.

The power to sell, vested in the collector by the act of 1816, ch. 171, is a naked power, specially conferred by statute, under proceedings *ex parte* in character, and the purchaser who claims under such power, must show affirmatively and positively the regularity of the proceedings out of which it grew, and the existence of all the prerequisites upon which its lawful exercise depended.

A notice of sale under the 3rd section of the act of 1816, ch. 171, which

describes the property as "a lot belonging to *W*, situated on the east side of South street, assessed with damages to the sum of $6.72," without designating its dimensions, on the particular part of the street on which it is located, by reference to a plat or otherwise, is too vague and uncertain in its terms, and is a fatal objection to the validity of the sale.

The advertisement must describe the property so definitely and precisely as that purchasers may, without dificulty, estimate its value.

Appeal from *Baltimore* county court.

This was an action of *ejectment*, instituted by the lessee of the appellees, on the 19th of April, 1841, for a lot of land situated on the east side of *South* street, in the city of Baltimore, particularly described in the declaration.

The tenants in possession, the appellants, appeared and pleaded *non cul*, on which issue was joined.

Upon the first trial of this case, the verdict under certain instructions by the court was for the defendants, the present appellants, and from the judgment thereon rendered, the plaintiffs, the present appellees, appealed, and at December term 1844, the Court of Appeals reversed the judgment and awarded a *procedendo*. The report of this appeal is in 2 *Gill*, 204.

The trial under the *procedendo* was had at May term 1847. At this trial, the plaintiff to prove the issue on his part, proved that *Daniel Bowley*, who is admitted to have been at the time, seized in fee of the lot of land in controversy, executed a lease thereof to one *Solomon Etting*, dated the 21st of December, 1798. This lease was for ninety-nine years, renewable forever, reserving the yearly rent of $100, payable to the lessor, his heirs, and assigns, on the 1st of May in each year, and contained a clause of re-entry for the non-payment of the rent.

The plaintiff then proved that this lease by several mesne conveyances become vested in *George G. Kraus*, who died in November, 1811, having first duly executed his will, which contained the following devise of the lot in question :

"*Item.*—I give to the children of my oldest daughter, *Margaret Walter*, the brick warehouse in *South* street, with its appurtenances thereon, during the residue of the term originally letten, with the benefit of renewal forever, subject to the

yearly rent reserved thereon. The rent thereof, my son-in-law, *Philip Walter*, shall receive, as soon as he and my daughter *Margaret* keep house for *themselves*, and not sooner."

And further proved that *Margaret Walter* and her husband *Philip Walter*, named in said will, survived the testator, but died before this suit was instituted, and that the lessors of the plaintiff, are the children of said *Margaret* and *Philip*.

And the defendants on their part proved, that the said *Daniel Bowly* conveyed to *John Merryman*, the reversion in fee of said ground, by deed, duly executed on the 15th of August, 1806; and that by devise under the will of said *John Merryman*, duly proved and admitted to record, said reversion became vested in the defendant *Sarah Rogers Alexander*, on the 23rd of February, 1814.

And further read in evidence the deposition of *John Merryman*, taken before a justice of the peace by consent of parties, subject to all exceptions as to the effect of the testimony.

"That deponent is a brother of *Sarah Alexander*, wife of the defendant, *Ashton Alexander*, and knows the lot in controversy, the reversion of which, *John Merryman*, deponent's father, had acquired, it being leased to *George Kraus*; that the ground rent was, after his father's death, the property of said *Sarah;* that *Kraus* paid the ground rent to deponent's father, and afterwards to said *Sarah*, until said *Kraus*' death, after which, *Philip Walter*, who married *Kraus*' daughter, took possession of the ground, and paid the ground rent for some years, the last payment he made was up to 1st May, 1819. Soon afterwards, *Philip Walter* moved from the property, and the house was shut up and no tenant in it, and continued so for upwards of a year. Deponent, for his sister, *(Sarah,)* then rented out the property to one *Horton*, who remained in the property upwards of a year, and at length moved away, and then the property remained unoccupied about a year, and then deponent rented it to a *Mr. Smith*. Deponent received from *Horton* and *Smith*, about $190 for his sister, and paid for her all the taxes: county taxes back to 1819, the city taxes beginning in 1820 or 1821, not later than 1821.

Smith was not in the property more than three months, he left it, deponent thinks, in the year 1822. After *Smith* went, deponent rented the property for his sister, to *Shellman* and *Swain*, and they occupied it until *Dr. Alexander* married his sister, and then deponent's agency ceased. No ground rent paid to his sister after 1st of May, 1819."

And further to prove the issue on their part, the defendants read in evidence, by consent, the act of 1816, ch. 171, entitled, "An act authorising the connecting of *Water* street with *King Georges* street at *Jones'* falls, in the city of *Baltimore*."

The 1st section of this act authorises and requires the city commissioners of *Baltimore*, "to alter and extend the lines of *Water* street from *Warden* street to *Jones'* falls, and to alter and extend the lines of *King Georges* street to said falls, in such manner as shall be found most suitable for erecting a bridge over said falls, thereby affording a convenient passage from one of those streets into the other; and to make and return a plat of such alterations and extensions to the register of the city."

The 2nd section authorises and requires the mayor of said city "to appoint five suitable persons as assessors, to value and assess the damages which may be sustained by any person or persons, by the altering and extending said streets," and to apportion such damages to and amongst the owners of property, who in their judgment, shall be benefited thereby."

The 3rd section authorises and requires the city collector "to collect the damages to be apportioned as aforesaid from the several persons chargeable therewith, in the like manner as public taxes of the city, or by sale of the property, or so much thereof as may be necessary therefor, on which such damages may be assessed, if the owner or owners shall neglect or refuse to discharge the same; first giving at least thirty days' notice, in two or more newspapers published in the city of *Baltimore*, of the time and place of such sale."

And further offered in evidence the plat returned agreeably to the said act by the city commissioners of *Baltimore*, and

the appointment thereupon of assessors conformably to said act, who proceeded to execute the duties assigned them; and read in evidence the said proceedings, which, so far as the lot in controversy is concerned, state the assessment of it as follows: "East side *South* street, *Philip Walter*, $6.72."

That portion of the original plat returned as above, which contained the location of the lot in dispute, had been torn off and lost.

And the defendants to prove a sale for satisfying the assessment of the piece of ground claimed in this cause under the said act, and due notice of said sale, read in evidence the following notice of sale:

"In pursuance of the act of Assembly for connecting *Water* street with *King Georges* street, at *Jones'* falls.

Notice is hereby given, that on *Tuesday*, the 25th day of July next, at the auction room of *Messrs. Van Wyck* and *Morgan*, will be offered for sale for cash to the highest bidder, (in default of the payment of the sums with which they are respectively charged, and cost of advertising,) the following lots of ground with their improvements, or so much thereof as may be necessary, which have been assessed to the persons whose names are set opposite thereto, viz:

Lot on east side *South* street, $6.72, *Philip Walter*," &c., &c. "THOMAS ROGERS, Collector."

"*Baltimore*, June 23rd, 1820."

And proved that the same was published for thirty days before said sale, in two daily newspapers published in the said city. And further read in evidence the deed of said *Thomas Rogers*, as collector aforesaid, dated 16th of October, 1820, and conveying to *Philip Reigart*, the lot in question. This deed recites the proceedings of the assessors under the aforesaid act of Assembly, and the sale of this lot in pursuance thereof to *Reigart*, for the sum of $50. They also offered in evidence a deed from said *Reigart*, the purchaser, conveying said lot to the defendant *Sarah*, on the 1st of October, 1847.

And the plaintiffs then further to prove the issue on their part, offered in evidence, (subject to all objection on the part of

the defendants to the effect thereof,) a record of proceedings in *Baltimore* county court, being an action commenced by *Sarah R. Merryman's Lessee, against Isaac J. Smith*, on the 17th of March 1823, for the lot of ground in controversy. The sheriff returned the copy of the declaration, "copy set up on the premises 17th of March, 1823." A judgment by default at March term 1823, was rendered against the casual ejector. The day of the demise was 1st January, 1816. On the 12th of February, 1824, the affidavit of the lessor of the plaintiff, recited in the opinion, was filed in the cause, and on the same day, the plaintiff sued out a writ of *hab. fac. pos.*, under which possession was given on the 24th of February, 1824.

And also, (subject to objection as aforesaid,) read in evidence a record of proceedings in ejectment, being an action commenced by the said *Phillip Reigart's Lessee, against Philip Walter*, on the 2nd of November, 1820, for the lot in question. The demise laid in the declaration, is on the 26th of October, 1820, and the return of the sheriff is, "copy set up on the premises the 15th day of March, 1821." *Walter*, the defendant and tenant in possession, appeared and pleaded *non cul.* The cause was then continued from term to term, until June, 1824, when the following docket entry was made in the cause. "Agreed, 10th of June, 1824."

And also proved, that the defendants in the former trial in this court, offered in evidence on their part, the said proceedings in the case of *Sarah R. Merryman against Smith*, it being admitted that said *Sarah* is the present defendant, *Sarah Rogers Alexander*, wife of the defendant *Ashton*.

And thereupon the plaintiff prayed of the court the following instruction to the jury.

That the proceedings in ejectment, in *Merryman's Lessee, vs. Smith*, estop the defendant from denying the possession of *Walter*, of the premises in question, at the time when such ejectment was brought.

The defendants prayed the court to direct the jury, that—

1st. If they shall find that the defendant, *Sarah*, entered

into possession of the premises described in the lease from *Daniel Bowley* to *Solomon Etting*, by renting them out, as stated in the testimony, and that there was under the lease in evidence, one year's rent in arrear when the possession was so taken, and that she and her husband, *Ashton Alexander*, have so thenceforth kept the said possession, and were, and had been so in possession for more than twenty years before the bringing of this action; and that the plaintiffs claim title under the lease of *Daniel Bowley*, read in evidence; then, that the defendant *Sarah* became, by devise from *John Merryman*, the owner in fee of the reversion of said *Daniel Bowley*, arising on said lease; and that said reversion was vested in her, at the time of her taking possession in manner aforesaid, at and before the rent aforesaid, became as aforesaid, in arrear, then the plaintiffs are not entitled to recover.

2nd. If the jury shall find that the defendant, *Sarah*, entered into possession in manner as stated in the aforegoing prayer, and that she and her said husband have thenceforth continually held said possession; and had so held it more than fourteen years, when this suit was instituted; and if they shall find the other matters set forth in the above prayer; the plaintiffs are not entitled to recover.

3rd. if the jury shall find the passing of the act of Assembly in relation to *Water* street, read in evidence, and that all the proceedings thereunder, as given in evidence, took place, and that thirty days' notice of the sale of the property assessed, as to *Philip Walter*, in said proceedings, took place, and that said property was the property claimed by the plaintiffs in this case; and that a sale did accordingly take place of said property, and that thereupon the deeds of *Thomas Rogers*, the city collector, to *Reigart*, and from *Reigart* to *Sarah Alexander*, were executed and acknowledged, and recorded, as set forth in the testimony, the plaintiffs are not entitled to recover.

And the court, (Archer, C. J., and Le Grand, A. J.,) granted the instruction prayed by the plaintiff, and refused to grant the prayers of the defendants; to which opinion of the court in granting and refusing the respective prayers afore-

said, the defendants excepted, and the verdict and judgment being against them, appealed to this court.

The cause was argued before Dorsy, C. J., Chambers, Spence and Martin, J.

By Meredith and Mayer, for the appellants, and
By Glenn, for the appellees.

Martin, J., delivered the opinion of this court.

The first question presented for our examination by this record, is, whether the court below erred in deciding that the proceedings in the ejectment of *Merryman's Lessee, against Smith*, estop the defendants in this case, from denying the possession of *Philip Walter*, of the premises in controversy, at the time when such ejectment was brought?

When this case was before the Court of Appeals in 1844, 2 *Gill*, 204, the character of the judgment rendered by *Baltimore* county court, in the ejectment cause to which we have reference, was considered; and it was then held by the court, that it was not to be treated as a statutory judgment, under the act of 4 *Geo.* 2, *ch.* 28, and vested no title in *Mrs. Alexander*, then *Miss Merryman*, and constituted no bar to the appellee's right to recover the demised premises. The language of the court is:

"To give to this judgment the efficacy ascribed to it, it must appear to this court to be a judgment rendered under the statute of 4 *Geo.* 2; or in other words, the record must disclose such facts and circumstances as would justify us in believing or assuming, that in rendering its judgment, the court below designed to exercise the authority conferred on it by the statute. The record before us discloses nothing which could warrant us in any such assumption or belief. All the proceedings in ejectment; until long after the judgment, show it to have been an ordinary case of ejectment, (having no connection with the statute,) the judgment in which, is conclusive upon nobody."

In the proceedings in this ejectment of *Merryman's Lessee, vs. Smith*, an affidavit was filed by *Sarah Rogers Merryman*, the lessor of the plaintiff, in which she deposed: "that at the time of issuing the declaration, and before the time of serving a copy of said declaration on the tenant in the possession of the premises, in said declaration mentioned, there was and is now due, and in arrear to the said *Sarah*, as landlord of said premises, the sum of $300, for three years' rent of said premises; and the further sum of $49.50, balance due, and in arrear for one other year's rent thereof; and that at the time of serving the copy of the said declaration on the tenant in possession of the premises, in said declaration mentioned, she was, and now is, landlord of said premises, and that the said *Isaac J. Smith* was the tenant in the possession thereof; and that she then had, and now has power to re-enter on said premises for non-payment of said rent; and that at the time, and before said ejectment was served, no sufficient distress was found on said premises, and countervailing the arrears of rent then due to this deponent." This affidavit was sworn to on the 3rd of February, 1824. And the propositions presented for our consideration on this branch of the case, is, whether the proceedings in this ejectment are to be regarded as an estoppel, as matter of record, or as an estoppel *in pais* standing upon the affidavit, so as to preclude the appellants from showing by evidence, that they were in the possession of the demised premises, antecedent to the 17th of March, 1823, the period at which the ejectment was instituted?

It is impossible to maintain that the proceedings in the ejectment are to be treated as an estoppel by the record. Irrespective of all other objections, they are deficient in the indispensable ingredient of mutuality. *Philip Walter* was not a party to the suit in which the judgment by default was rendered. He had no connection or privity with *Smith*, the tenant in possession. So far from being represented by *Smith*, their titles were conflicting and antagonistical; *Walter* professing to claim under the original lease, and *Smith* holding the property, so long as he retained it, as the immediate tenant of

Mrs. Alexander. The Court of Appeals, in 2 *Gill*, 204, decided that it was not competent for the appellants to rely upon this recovery in the ejectment, in the case of *Merryman's Lessee, vs. Walter*, as a conclusive bar against the right of the appellees to recover the demised property in this action, and the rule of reciprocity upon which this doctrine of estoppel stands, forbids the appellees from using it as an estoppel against the defendants. The authorities upon this point are uniform and conclusive.

In *Viner's Abg. tit. Estop., sec. A*, 2, the law of estoppel is thus laid down. "Every estoppel ought to be reciprocal, that is to bind both parties, and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel, privies in blood as the heir, privies in estates, as the feoffee, lessee, &c., privies in law, as the lord by escheat, &c. Shall be bound and take advantage of estoppels."

In the case of *Gaunt vs. Wainman*, 3 *Bingh., N. C.*, 69, the assignees of the demandant's husband, who was a bankrupt, conveyed the lands in controversy to the tenant as freeholder. It was a writ of dower, and the question was, whether the defendant who claimed under the deed, was estopped from showing that the premises were leasehold?

Tindal, C. J., ruled it to be no estoppel. He said, "As between the parties to the deed, there may be an estoppel; but it is set up against a stranger to the deed. Suppose the tenant had bought the premises as leasehold, would the demandant be estopped to say that they were freehold? This is a case in which the defendant is not precluded from showing the real nature of the estate. According to *Coke Lit.*, 352, *a.*, every estoppel ought to be reciprocal, that is, to bind both parties, and this is the reason that regularly a stranger shall neither take advantage, nor be bound by the estoppel."

In *Lansing vs. Montgomery*, 2 *John. Rep.*, 381, an action of trespass was brought by *Montgomery* against two defendants, *Lansing and Goeway*. *Goeway* pleaded a former suit, and a judgment in his favor, to which the plaintiff demurred, and judgment was given for the defendant. *Lansing*, the other

defendant pleaded the general issue. It was held by the court that the plaintiff was not estopped by his demurrer to the plea of *Goeway*, from replying to the plea of *Lansing*, and going to trial on that issue; upon the ground that *Lansing* was not a party to the demurrer, "and one that is not bound by, cannot take an advantage of, an estoppel."

In *Hurst's Lessee, vs. McNeil*, 1 *Wash. C. C. Rep.*, 70, the defendant's counsel offered to read in evidence to the jury, the record of a trial between the lessor of the plaintiff and one *Pemberton*. The evidence was ruled to be inadmissible. *Mr. Justice Washington* said, "If there be a point completely settled and at rest, it is this, that a verdict between different persons cannot be given in evidence in a suit of one of the parties against a stranger."

Lord Coke, in his twenty-first reading on fines, says, "estoppel is reciprocal; for he that shall not be concluded by the record or other matter of estoppel, shall not conclude another by it; except in the case of the King, and that depends upon his prerogative." This passage is quoted by *Mr. Justice Bayley*, in *Doe vs. Martyn*, 8 *Barn. & Cres.*, 497, where he clearly enunciates the principle, conclusive upon the point we are now considering, that estoppels must be reciprocal, that they operate only on parties and privies, and that they can be used neither by, nor against strangers.

We have already seen that the affidavit of the 3rd of February, 1823, filed by one of the appellants, as the lessor of the plaintiff, in *Merryman's Lessee, against Smith*, states that *Smith* was, at the time a copy of the declaration in the ejectment was served upon him, that is, on the 17th of March, 1823, the tenant in possession of the premises in dispute; and this affidavit, containing as it does, the declarations of a party to the record in the present suit, was unquestionably admissible in evidence as an element in the testimony introduced into the cause, to be considered and weighed by the jury, with respect to the question as to the period at which the appellants first entered into the possession of this property. The counsel for the appellees has, however, contended that the admission embodied

in this affidavit, operates as an estoppel in *pais;* is conclusive in its character, and precludes the appellants from proving that they took possession of the premises in controversy, prior to the time when the ejectment of *Merryman's Lessee against Smith* was brought. The solution of the question thus raised by the argument of the counsel for the appellees, depends upon authority, and we are satisfied, after a careful examination of the prominent cases upon the subject, that his proposition cannot be maintained.

The doctrine upon this point is correctly stated by the court, in the case of *The Welland Canal Company vs. Hathaway*, 8 *Wend.*, 483. The court said:—

"An estoppel is so called because a man is concluded from saying any thing, even the truth, against his own act or admission. The acts set up in this case, it is not pretended, constitute a technical estoppel, which can only be by deed or matter of record; but it is said they should operate by way of estoppel, an estoppel *in pais*. Such estoppels cannot be pleaded, but are given in evicence to the court and jury, and may operate as effectually as a technical estoppel, under the direction of the court. * * * As a general rule, a party will be precluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. * * * All the cases in which the acts or admissions of a party are adjudged to operate against him, in the nature of estoppel, are generally cases where, in conscience and honest dealing, he ought not to be permitted to gainsay them."

In the case of *Dezell vs. Odell*, 3 *Hill N. Y. Rep.*, 215, the goods of *David Mitchell and Alexander Dezell*, were seized under an execution, and were delivered to the defendant upon his receipt, stipulating to re-deliver them to the officer by a designated day. They were not surrendered. And in an action of trover instituted by the officer against the receiptor, he offered to prove that the property was, at the time of the levy and re

ceipt, his own. The receipt was ruled to be an estoppel. The court said:—

"We have the clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This is the very definition of an estoppel *in pais*. For the prevention of fraud, the law holds the admission to be conclusive."

In the case of *Presbyterian Congregation of Salem, vs. Williams*, 9 *Wend.*, 147, an action of ejectment was instituted by the plaintiffs, claiming to re-enter upon the premises in the possession of the defendant, as tenant, for the non-payment of rent. At the time of the service of the declaration, although there was property upon the land, the defendant declared that it did not belong to him, and that it was exempted by law from being distrained for rent. At the trial, the defendant offered to show there was sufficient property on the premises, out of which the rent could be collected, and that the action could not, therefore, be maintained. The defendant was considered by the court as the real party to the suit, and he was not permitted to controvert his admissions. This was a clear case for the application of the doctrine of estoppel. The plaintiffs were influenced by the representations of the defendant, and acted upon them. In the language of the court, the plaintiffs had a right to rely upon the admission of the defendant, that there was not sufficient property on the premises, liable to distress, to countervail the arrears of rent, and he ought not to be permitted to defeat the action, by showing what he then said was false, and thereby reap an advantage from his own wrong and falsehood.

In *Heane vs. Rogers*, 9 *Barn. & Cres.*, 577, an action of trover was brought by the plaintiff (against whom a commission of bankruptcy had issued,) against his assignees, to recover goods, which they, as such assignees, had sold. To prove that the plaintiff was a bankrupt, the defendants introduced a notice addressed, by the plaintiff, to certain persons from whom he had

leased an estate, in pursuance to the statute of 6 *Geo.*, 4, *ch.* 16, *sec.* 75, offering to surrender his lease, upon the ground that he was a bankrupt. The question was, whether the plaintiff was estopped by the act of having given up his lease to the lessors, from disputing the validity of the commission under which the defendants acted, they not being parties or privies to that transaction? The point was decided in favor of the plaintiff, and we refer to the opinion of *Mr. Justice Bayley*, as containing a clear enunciation of the doctrine of estoppel, as applicable to the case before us. He said:—

"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced, by them, to alter his condition. In such case, a party is estopped from disputing their truth with respect to that person (and those claiming under him,) and that transaction; but as to third persons, he is not bound. It is a well established rule of law, that estoppels bind parties and privies, not strangers. The offer of surrender, made in this case, was to a stranger to this suit; and though the bankrupt may have been bound by his representation that he was a bankrupt, and his acting as such, as between him and that stranger to whom that representation was made, and who acted upon it, he is not bound, as between him and the defendant, who did not act on the faith of that representation at all. The bankrupt would probably not have been permitted, as against his landlords, whom he had induced to accept the lease without a formal surrender in writing, and to take possession upon the supposition that he was a bankrupt, and entitled, under 6 *Geo.*, 4, *ch.* 16, *sec.* 75, to give it up—to say, afterwards, that he was not a bankrupt, and bring an action of trover for the lease, or an ejectment for the estate. To that extent he would have been bound, probably no further, and certainly not as to any other persons than those landlords."

We have quoted largely from the opinion of the learned

judge in this case, as bearing directly upon the point under examination, and we regard it as a conclusive authority against the proposition advanced by the counsel for the appellee. If a case had arisen between the appellants and *Smith*, in which it was important to inquire, whether *Smith* was in the occupation of the demised premises at the time the declaration in the ejectment was served upon him, the appellants might, with respect to *Smith*, in such contest, be precluded from disputing the statements in the affidavit. For *Smith* was a party to the suit in which the affidavit was filed. But this was not the predicament of *Philip Walter*. He was a stranger to that suit. He did not act upon the admissions contained in the affidavit, and was not injured, misled or deceived by them. And it cannot be said, that it is against conscience and good faith to allow the appellants to abandon the line of defence occupied by them at the former trial, when they relied upon the judgment, in *Merryman's Lessee, against Smith*, as based upon the affidavit in conformity with the statute of 4 *Geo.*, 2; and now show, by evidence, as against these parties, that they, in fact, entered upon the demised premises as far back as 1820, under their common law right of re-entry for the non-payment of rent; and had continued in the uninterrupted and adverse possession of the property from that period up to the time of the institution of this suit. The doctrine of estoppel *in pais*, stands upon the broad grounds of public policy and good faith; it is interposed to prevent injustice, and to guard against fraud, by denying to a party the right to repudiate his admissions, when those admissions have been acted upon by persons to whom they were directed, and whose conduct they were intended to influence; but it has no application to a case like the one now under our consideration. We think, therefore, that the court below erred in granting the plaintiff's prayer.

We proceed to examine the legal propositions raised by the prayers offered, at the trial below, by the counsel for the appellants.

They asked the court to instruct the jury: *First*. If the jury shall find that the defendant, *Sarah*, entered into the po-

session of the premises described in the lease from *Daniel Bowley* to *Solomon Etting*, by renting them out, as stated in the testimony, and that there was, under the lease in evidence, one year's rent in arrear when the possession was so taken, and that she and her husband, *Ashton Alexander*, have so henceforth kept the said possession, and were, and had been so in possession for more than twenty years before the bringing of this action; and that the plaintiffs claim title under the lease of *Daniel Bowley*, read in evidence, that the defendant, *Sarah*, became, by devise from *John Merryman*, the owner in fee of the reversion of said *Daniel Bowley*, arising on said lease, and that said reversion was vested in her at the time of her taking possession in manner aforesaid, at and before the rent aforesaid became as aforesaid in arrear, then the plaintiffs are not entitled to recover. And *secondly*. If the jury shall find that the defendant, *Sarah*, entered into the possession in the manner as stated in aforegoing prayer, and that she and her said husband have henceforth continually held said possession, and had so held it for more than fourteen years, when this suit was instituted, and if they shall find the other matters set forth in the above prayer, the plaintiffs are not entitled to recover.

By the terms of the lease from *Daniel Bowley* to *Solomon Etting*, of the 21st of December 1798, under which the appellees claim title to the premises in controversy, it is stipulated that if the rent therein reserved, shall be in arrear and unpaid for the space of sixty days next after the time on which the same is to be paid, the same being first lawfully demanded, it shall be lawful for the said *Daniel Bowley*, his heirs or assigns, into the said demised premises, or any part thereof, in the name of the whole, to re-enter, &c. And the propositions presented in argument by the counsel for the appellants, are: *First*. That assuming that the facts hypothetically set forth in the prayers to be true, that the jury were bound to presume, from the possession of twenty years, as therein stated, that the defendants had made a regular and lawful re-entry at common law, on the demised premises, for the non-payment of rent, according to the condition of the lease. And *secondly*. That this

presumption was to be deduced as a legal inference, from a possession of fourteen years.

Upon these points, we have been referred to several cases decided by the Supreme Court of *New York*, which we now propose to examine.

The case of *Jackson vs. Demarest*, was decided in 1805, 2 *Caine's Rep.*, 381, and it was there held, that a demand and entry at common law, would be presumed after a possession of fourteen years. *Mr. Chief Justice Kent* said:—

"The lessor of the plaintiff and his family abandoned the possession in 1778. In 1785, the landlord had a right to re-enter for non-payment of rent, and he then sold the land. In 1789, *Kason*, under his title takes possession. Here, then, is certainly a fourteen years' possession, and after that, we will presume a regular re-entry at common law. Re-entry is a matter *in pais*, and not of record."

In 1808, the case of *Jackson vs. Walsh* was decided, 3 *John. Rep.*, 226, and it was there determined, that a possession of nine years did not afford a presumption of a re-entry for non-payment of rent.

In *Jackson vs. Stewart*, 6 *John. Rep.*, 34, a regular re-entry was presumed from a possession of twenty-two years.

In *Jackson vs. Elsworth*, 20 *John. Rep.*, 180, it was held, that a possession of ten years was insufficient to warrant the presumption that the landlord had made a regular re-entry for the non-payment of rent. *Woodworth, J.*, said:—

"It is well settled, that the right of the tenant can only be barred by ejectment under the statute. A re-entry at common law does not defeat the title in equity. It is, however, sufficient for the defendant, if a re-entry in either way can be presumed, for then he holds the possession rightfully against the plaintiff." After stating that, under the circumstances of the case, an entry under the statute could not be presumed, and referring to the case of *Jackson vs. Demarest*, 2 *Caine's Rep.*, 382, before adverted to, he remarks: "In that case, which is the shortest period that has been deemed sufficient, the court do not rest the presumption on a re-entry by ejectment under the statute, but at com-

mon law, evidently because no presumption of the former could be indulged, so long as the record of recovery was not produced, or some cause assigned for its non-production. Considering that this principle operates in derogation of the grant, I think our courts have been sufficiently liberal, and that a shorter period, if sanctioned, would frequently be productive of manifest injustice. In *Jackson vs. Walsh*, nine years was held insufficient. The presumption relied on, would derive but little support from an additional year. I am of opinion, that the lapse of time is not sufficient to raise a presumption of re-entry either at common law, or under the statute."

It appears, therefore, from the adjudged cases in *New York*, that a possession of fourteen years is there regarded as the period from which a regular re-entry at common law will be presumed. But the rule thus established by the courts of that State is entirely arbitrary, is not sustained by authority or analogy, and one to which we cannot assent. We think, however, in analogy to the statute of limitations, that if the jury had found that the facts assumed in the first of the defendants' prayers were true, and that the defendants had been, for twenty years, in the uninterrupted, exclusive, notorious, and adversary possession of the property in dispute, they would have been bound to presume a regular re-entry at common law for the non-payment of rent, and this re-entry being presumed, the defendants would, in legal contemplation, have been regarded as rightfully holding the possession against the plaintiffs. But the vice of the prayer is, that the question of adversary possession was not presented as fact, to be found by the jury. *Matthews vs. Ward's Lessee*, 10 *Gill & John.*, 458. *Jackson vs. Porter*, 1 *Paine C. C. Rep.*, 466. *Angel on Lim.*, 413.

Upon this ground, the court were right in rejecting the defendants' first prayer.

We think, for the reasons already expressed, that the court were correct in rejecting the defendants' second prayer. Reasoning analogically from the statute of limitations, and the doctrines of presumption as applied to land, a possession for a less period than twenty years, is not, in our opinion, sufficient

to warrant the inference, that there was a regular re-entry at common law, for the non-payment of the rent reserved by the lease.

The question raised by the defendants' third prayer, relates to the validity of the sale made by *Thomas Rogers*, as the collector of the city of *Baltimore*, on the 8th of August, 1820, of the property in controversy, to *Philip Reigart*, in pursuance of the act of Assembly of 1816, ch. 171, and conveyed by *Rogers* to *Reigart*, by a deed bearing date the 16th of October, 1820. This property was subsequently conveyed by *Philip Reigart* to the defendants, on the 1st of October, 1840.

We find from the record, that on the 2nd of November, 1820, an action of ejectment was instituted in *Baltimore* county court, for the recovery of this property, by *Philip Reigart*, against *Philip Walter*, and that on the 10th of June, 1824, this suit was entered upon the docket, "agreed." This evidence was offered at the trial below, subject to exceptions, and it is now contended, by the counsel for the appellees, that the effect of this entry upon the docket, was to extinguish the legal title of *Reigart* in the lot for which the ejectment was brought, and operates as a conclusive bar against the defendants who claim under him.

This proposition cannot be maintained. There appears to have been no judgment rendered by the court, dismissing the suit, upon the foundation of the agreement, as in the case of *The Bank of the Commonwealth, vs. Hopkins*, 2 *Dana*, 395; we have no information with regard to the character or terms of this indefinite agreement, and the only deduction to be drawn from it, is, that each party retired from the litigation in which they were involved, leaving their rights precisely as they stood prior to the institution of the suit. In the case reported in 2 *Dana*, the mere agreement was not regarded by the court as interposing a bar between the parties, but the bar was created by the *judgment*, dismissing the suit at the instance of the parties, and in consequence of their agreement. In the case before us, there was no such judicial action.

Having disposed of this preliminary objection, we proceed to

consider the exceptions taken by the counsel for the appellees, to the validity of this sale. The first point made in the argument was, that the deed from *Rogers* to *Reigart*, of the 16th of October, 1820, was not evidence of the *factum* of the sale. This point is not tenable.

The 3rd section of the act of Assembly of 1816, ch. 171, imposes upon the collector the duty of collecting the damages apportioned, as required by the preceding sections, by a sale of the property on which the damages are assessed, if the owner shall neglect or refuse to discharge the same, but is silent as to the power to convey, by deed, the property thus authorised to be sold. But the right to convey, is, we think, to be implied from the power to sell. This principle is clearly established by the reasoning of the court, and authorities cited, in the analagous case of *Magruder against Peter*, 11 *Gill & John.*, 217, If the power to convey is assumed, it is very certain that the deed must be regarded as evidence of the sale; for it is made in pursuance of the sale, and stands upon it. In the case of a sheriff's sale, the title passes by the sale, and not by the conveyance, and yet the deed of the sheriff has always been considered as evidence of the *factum* of the sale. In *Estep and Hall's Lessee, vs. Weems*, 6 *Gill & John.*, 306, the Court of Appeals said: "That it has been more than once solemnly decided by this court, that it is *the sale* of the sheriff, which vests the title in the purchaser, which sale must be proved either by a deed, the sheriff's return, or by some note or memorandum in writing, in order to comply with the requisitions of the statute of frauds and perjuries."

And in *Jackson vs. Roberts' Executors*, 11 *Wend.*, 426, the chancellor said:—

"A sale under an execution is essential to the transfer of the property, and after the execution is proved to have been in the hands of the sheriff, so as to authorise the giving of the deed, his conveyance is the legal evidence, under the statute of frauds, of a sale under that execution."

It is, therefore, very clear, upon the authorities to which we have referred, that the deed is to be received as evidence of the

sale, but it is not evidence of the regularity of the proceedings preceding the sale, and out of which the power to sell arose. The power vested in the collector to sell, in this case, is a naked power, specially conferred by statute, under a proceeding *ex-parte* in its character, and used for the purpose of divesting a citizen of his property without his consent; and no legal proposition is more firmly established, than that the purchaser who claims under a power of this character, must show affirmatively and positively the regularity of the proceedings out of which it grew, and the existence of all the prerequisites upon which its lawful exercise depended. *Williams vs. Peyton's Lessee*, 4 *Wheat.*, 77. *Ronkendorff vs. Taylor*, 4 *Pet.*, 349.

One of the acts *in pais* to be proved in this case, by the defendants, as a prerequisite upon which the power to sell depended, was, that the collector had given notice of the sale as prescribed by the 3rd section of the act of 1816, ch. 171; and a fatal objection to the validity of this sale is, that the advertisement relied upon as a matter of sale, in conformity with the requirements of the statute, does not describe, with sufficient certainty, the lot in controversy as a part of the property intended to be sold.

The act of Assembly, in requiring thirty days' notice to be given, in the newspapers of the city of *Baltimore*, of the time and place of sale, intended not only to apprize the owner of the predicament of his property, that he might rescue it from the hammer of the auctioneer, by paying the damages charged upon it, but also that the lot should be so definitely and precisely described, that purchasers might, without difficulty, estimate its value, and the property in this way placed in a condition to produce an adequate price.

In this notice of sale, the property in dispute was described as a lot belonging to *Philip Walter*, and assessed with damages amounting to the sum of $672, situated on the east side of *South* street, but without designating, by reference to the plot, or otherwise, the dimensions of the lot, or the particular part of the street on which it was located. An advertisement so vague and uncertain in its terms, conveys to the public no reliable in-

formation with respect to the value of the property, and has always been regarded as defective.

In the case of *Ronkendorff vs. Taylor*, 4 *Pet.*, 362, the Supreme Court, when considering what was to be regarded as a sufficient description of property advertised for sale by a collector of taxes, said:—

"That the property should be so definitely described, that no purchaser could be at a loss to estimate its value. It is not sufficient that such a description should be given in the advertisement, as would enable the person desirous of purchasing, to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public in the notice."

We consider the sale as inoperative upon this ground, irrespective of the other objections which have been urged against it.

It was also insisted by the counsel for the appellees, that the return of the assessors, acting under the 2nd section of the act of 1816, ch. 171, was to be treated as informal and defective, because this lot was not designated, with sufficient certainty, as a part of the *corpus* upon which the damages were laid. This objection is insuperable in the present mutilated condition of the plot. But the plot annexed to the return, is to be considered as a part of it, and we think, that if this lot had been located and described upon that plot as the other lots are designated, the return of the assessors would not have been obnoxious to this objection.

It follows, from the views thus expressed, that we think the court below erred in granting the plaintiff's prayer, and were correct in rejecting the prayers of defendants.

JUDGMENT REVERSED, AND

PROCEDENDO AWARDED.

Charles A. Waters *vs.* Charles R. Howard and wife, and others.—*December*, 1849.

A grandfather, in view of the marriage of his grandson, promised and agreed with the parties, and the mother and friends of the lady, to buy a farm, stock and furnish it, and place his grandson upon it, pay his debts, and give him a start in the world. The marriage was celebrated, and shortly thereafter, the grandfather purchased a farm for about $9,000, and put his grandson and wife in possession thereof, in part stocked it, and soon after died, leaving a will, by which he devised one-third of the residue of his estate, amounting to over $150,000, to his grandson, for life, with remainder to his children, in fee, if any living at his death, and if none, then to his two granddaughters, to whom the remaining two-thirds were devised, with similar limitations. The grandson and wife then filed a bill against the other devisees and executor of the grandfather, alleging that the latter *agreed* to purchase and stock a farm *for complainants*, if the proposed marriage between them should be consummated, and to pay all the debts of his grandson, and furnish adequate means for the support of him and his wife, for the first year after their marriage; that after their marriage, the grandfather, *in part execution of this agreement*, purchased the farm above mentioned, &c., but died without executing a deed to complainants, for the land, or performing the other parts of this agreement, which the bill prays may be specifically executed. Pending this suit, the wife died without issue, and it appearing, from the proof, that the grandfather had the title to the farm conveyed to himself, after the marriage, and while the grandson and his wife were in the possession of it, and that it was his intention to give the possession, only, of the farm, and not the title, to the grandson, whom he wished to reclaim from dissipated and extravagant habits, the chancellor dismissed the bill, and this decree was on appeal affirmed.

The circumstances of this case are clearly distinguishable from those of *Dugan, et al., vs. Gittings, et al.*, 3 *Gill*, 138.

Marriage is a good and valuable consideration to sustain a contract. But the contract must be certain in all its particulars; so clear and definite, and so far satisfactorily proved, as to be capable of specific execution.

If it be a parol contract, to take it out of the statute for part performance, the terms must be definite and unequivocal. If uncertain or ambiguous, a specific performance will not be decreed, for the court may enforce what the parties never intended, or contemplated.

If a contract is sufficiently established or admitted, it still remains with a court of equity, as a matter of sound discretion, whether, under the circumstances, they will decree specific performance.

In cases of specific performance, courts of equity may exercise a sound, reasonable discretion, governed by rules and principles as far as may be, yet granting or withholding relief when those rules and principles will

not furnish any exact measure of justice, according to the circumstances of each case, or where the decree, under the circumstances, would be inequitable.

If a marriage contract, containing provisions for children, has been established, and in part executed, and the wife dies without issue, and, by such death, the surviving husband has suffered no injury or prejudice by what has been done towards the promised provision for his wife, equity will not interfere to decree specific execution in his favor.

Where a grandfather made provision for the marriage of his grandson, which he did not fulfil to the letter, but, by his will, made a larger and much more beneficial one, this latter provision is a substitute for the former, and excludes the idea of a double portion to the grandson.

Appeal from the *Court of Chancery*.

The bill in this case was originally filed on the 2nd of November, 1846, in *Baltimore* county court, as a court of equity, by *Charles A. Waters*, the appellant, and his then wife, *Ann Rebecca Waters*. Pending the suit, she died without issue, and the cause was removed to the court of chancery. *Charles A. Waters* was, therefore, the only complainant at the time of hearing, and is the only party appealing from the decree.

The allegations of the bill and answers, and all the facts and proofs in the case, are fully stated in the opinions of the chancellor, and of this court.

On the 28th of January, 1848, the chancellor (Johnson,) passed a decree dismissing the bill, with costs. Accompanying this decree, he delivered the following opinion, a report of which will be also found in 1*st Md. Ch. Decisions*, 112.

"This case, which originated upon a bill filed on the 2nd of November, 1846, on the equity side of *Baltimore* county court, and was afterwards transferred to this court, has been fully argued by the solicitors of the parties, and is now submitted for decision.

"It was filed by the present complainant and his now deceasd wife, *Ann Rebecca Waters*, formerly *Ann Rebecca Somerville*, who died on the 29th of January, 1847, without issue, and seeks to enforce the specific performance of what is alleged to have been a contract made with the complainants, prior to their marriage, by *Charles Waters*, the grandfather of *Charles A*

Waters, by which it is charged, that he, the grandfather, agreed that if the then intended marriage should be consummated, he would purchase and fully stock a farm for the complainants, would pay all the debts of the said *Charles*, one of the complainants, existing at the time of his marriage, and would furnish adequate means for their support for the first year thereafter; and that in consequence of these promises and engagements, the marriage was solemnised on the 4th of February, 1846.

"It is charged, that shortly after the marriage, the grandfather, in part execution of his said contract, purchased of *Benjamin Moore*, a farm in *Baltimore* county, of about one hundred and eighty-nine acres of land, and put complainants in possession thereof, and in part stocked the same, and was about to pay the debts of the complainant, *Charles A.*, when he, the grandfather, sickened and died, without executing to the complainants, or either of them, a deed for the land, or paying the debts, amounting to about $2,000, and without fully supplying the complainants for one year after their marriage.

"That the grandfather, by his will, which the bill exhibits, devised all the residue of his estate to one *Freeborn G. Waters*, and his heirs, in trust, as to one-third of the income for the complainant, *Charles A.*, for life, with remainder to his children, in fee, if there should be any living at the time of his death, and if none such, then the whole to go over to the testator's granddaughters, *Elizabeth A. Howard*, and *Rebecca A. White*, and their children. And the other two-thirds of the income for the use of the said *Elizabeth A. Howard* and *Rebecca A. White*, respectively, for the life of each of them, with like limitations and restrictions as are contained in the devise, for the use of the said *Charles A.*, the grandson. That the testator's granddaughters have each one child.

"The bill makes the granddaughters, and their husbands, and infant children parties, and *Freeborn G. Waters* the trustee, and prays that they may be compelled to convey the said farm so purchased of *Moore*. That *F. G. Waters*, who is also executor of the will, be compelled to pay the debts due by

the complainant, *Charles A.*, at the period of his marriage, and to perform the other stipulations alleged to have been made by the testator, and for general relief.

"It appears, by the answers of the defendants, and otherwise, that *Charles A. Waters*, the complainant, and *Elizabeth A. Howard* and *Rebecca A. White*, two of the defendants, were brother and sisters, being the children of the late *Dr. Horatio Waters*, and the grandchildren of the testator. And by their answers they insist, that though the farm in question was purchased and stocked, and the complainants, soon after their marriage, put in possession of it, yet it was merely intended to give them the *usufruct*, and not the power of disposing of the property. The habits of the complainant, *Charles*, being expensive and extravagant, and known to be such by his said grandfather, who did not intend to give his said grandson more of his estate than he designed for his said sisters. That he never intended to give the complainants anything beyond the use of the farm and personal property, or to pay his grandson's debts, except upon the condition that his habits were reformed, a condition which has not been complied with.

"That to have transferred to the complainants a title which would have enabled them, or either of them, to part with the property, would have defeated the object of the grandfather, which was to furnish a provision for the grandson and his wife, for its use.

"That the wife of the surviving complainant died on or about the 29th of January, 1847, without issue, and upon that event, the right to require a conveyance of the property, if such right ever existed, (which is denied,) was determined.

"That if any such promise or agreement was made, as is set up in the bill, the provision in the will of the grandfather, for the grandson, his wife, if she should survive him, and his children, must be taken as a full satisfaction; the property so given by the will, being of greater value than that which is claimed under the agreement.

"That the property so claimed was regarded by the testator as forming a part of his estate at the time he made his will, and

was disposed of by that instrument, constituting a portion of that of which the use is devised to the grandson and his two sisters; and that the complainant must elect whether he will hold under the agreement, if any such was made, or under the will; and that having already accepted the provision made for him by the will, he cannot claim under the agreement. The statute of frauds is also pleaded in one or more of the answers, in bar of the relief prayed.

"The will of *Charles Waters*, the grandfather, executed on the 2nd of April, 1846, and proved on the 14th of May following, after some other devises and bequests, contains the following clause: 'I do hereby give and bequeath to my friend and relative, *Freeborn G. Waters*, his heirs, executors and administrators, all the residue of my estate, of every kind and description, real, personal and mixed, to be held by him, his heirs, executors and administrators, upon certain trusts.'

"These trusts are, in the first place, to pay certain sums to the testator's wife and son, during their lives; and then 'in trust as to all the residue of his estate, real, personal and mixed, that the said trustee should hold the income, interest, rents and profits of one-third part of the said residue, for the use of his grandson, *Charles Waters*, during his life, the same to be paid to him as they accrue, and after the death of his grandson, if he should leave a child or children, or descendant or descendants of a child or children living at the time of his death, then to hold the said one-third part for the use of such child or children, or descendants, their heirs, executors and administrators, forever, as tenants in common; and if the said grandson should die without issue, living at the time of his death, then to hold the one-half of said third part, and the income, &c., thereof, for the use of the testator's granddaughter, *Elizabeth A. Howard*, and her children, and their heirs, &c., subject to the same limitations, &c., as the one-third part of his estate afterwards devised to her use; and the other half of the said one-third is given, in the same way, to *Rebecca A. White*, the testator's other granddaughter. One other one-third of the income of his estate to be held by the trustee for the use of the said *Eliza-*

beth A. Howard, as her separate estate, during her life; and after her death, if she leave a child or children, or descendants of such, living at the time of her death, then to hold the same for the use of such child, &c., their heirs, &c., as tenants in common. But if the said granddaughter should die without issue, living at her death, then the third so devised for her use, should be divided between the grandson and the other granddaughter, in the same manner, and subject to like limitations as were expressed with regard to the third of which the income was devised to the grandson. And similar provisions were, in all respects, made with regard to the one-third of which the use was devised to *Rebecca A. White*, the other granddaughter.'

"It appeared, by an agreement signed by the counsel, that the land mentioned in the bill, as having been purchased by the testator from *Benjamin Moore*, was conveyed by him to the testator, on the 17th of February, 1846, and that it contained the quantity of one hundred and eighty-five acres, one rood, and ten perches. It also appeared, by a statement admitted in evidence, that the entire value of the estate of the testator, including the property claimed by the complainants in this case, was nearly $150,000, and that this last mentioned property is valued at $9,000.

"A commission issued, under which a number of letters, written by the testator, were returned, and the depositions of several witnesses taken; but it would be an unnecessary consumption of time, to enter into a minute examination of the proof, it being deemed sufficient, in expressing the views of the court upon the propositions discussed by the counsel, to state the impression which the evidence has made upon my mind.

"The bill, it will be seen, puts the title of the complainants to a decree, upon the ground that the testator agreed, that if they, the complainants, would intermarry with each other, he would purchase and fully stock a farm for them, as their property, and perform the other stipulations alleged to have been entered into on his part; and that in consequence of these promises and engagements, the marriage did take place, and as the consideration of marriage is a valuable consideration, in

contemplation of law, the complainants claim to be purchasers for value.

"These pretensions, on the part of the complainants, are denied by the answers, which insist that no such contract or promise was made by the testator, who designed to give the use, merely, of the property, and not to pass the title, and that such is the fair inference to be put upon his various acts and declarations, oral and written.

"The first question, therefore, is: have the plaintiffs succeeded in proving such an agreement as, upon the principles which govern this court in enforcing the specific execution of contracts, will entitle them to its interposition in this form, considering, for the present, that the agreement itself is, in all its parts, of that description which the court will, when fully proved, direct to be performed?

"This question can, of course, only be determined by a careful examination of the evidence, and after having read it with much attention, I find it, to say the least, very questionable whether the elder *Mr. Waters* did mean to pass to the complainants, or to the surviving complainant, in any event, such a title to the property in controversy, as is sought to be enforced by this bill. Looking to the whole evidence, written and oral, I am strongly inclined to the opinion, that the ground taken by the defence is the true one, and that the purchase of this farm, and the placing the grandson upon it, was intended for the double purpose of giving him the means of earning a present support, and as an experiment by which the grandfather hoped to wean him from his extravagant habits. Any other supposition would subject the grandfather to the imputation of having practised upon his grandson and his wife the grossest imposition.

"If, as the complainants say, they were induced to marry upon the faith of the engagement of old *Mr. Waters*, fully disclosed to give them the title to this farm, and to perform the other stipulations set up in the bill, and he, immediately after the marriage, took the title to himself, he was guilty of a degree of cruelty and deception towards them, wholly inconsistent with

that affection and regard for their welfare which appears upon the face of all his letters, and by the whole evidence. The marriage took place on the 4th of February, 1846, and the deed from *Moore* to the elder *Mr. Waters*, was executed on the 17th of the same month and year. Now, can it readily be believed, that this old gentleman would have entrapped these young people into getting married, by an agreement to make them the owners of this property, and then, in thirteen days from that time, shamefully violate his engagement by taking and keeping the title to himself? Such a supposition is irreconcilable with the nature of his feelings and relations towards them, and, to be credited, must be strongly supported by evidence.

"Much stress has been laid, by the complainant's counsel, upon the case of *Dugan, et al., vs. Gittings, et al.*, decided by the Court of Appeals, at December term, 1845. That case decides, what is believed to have been well settled before, that marriage is a valuable consideration, and that a promise made in consideration of marriage, cannot be revoked at the will of the party who made it. But the evidence in that case, as it appears to me, of the promise, was of a far more conclusive character than in this. Indeed, in that case, there could be no doubt, looking to the declarations and acts of *Mr. Dugan*, both before and subsequent to the marriage, that the property in question belonged to his daughter, *Mrs. Smith*, and her children; and there was not a single act or declaration of his, inconsistent with that view of the case. In this case, as I have already observed, there is much evidence leading to the different conclusions and various considerations of prudence, calculated to deter the grandfather from placing his property at the disposal of his grandson.

"Now this being a case in which the complainants call upon the court to interfere in their favor, by enforcing the specific execution of a contract, they must come before it with a much stronger case than if they were acting defensively, and merely resisting such an application made by the adverse party. Under the circumstances of this case, the court must entertain no rea-

sonable doubt of the existence of the contract, and be satisfied that it is one which, looking to what is just and reasonable, ought to be enforced. 2 *Story's Equity*, *sec.* 769. *Seymour vs. Delancey*, 6 *John. Ch. Rep.*, 222.

"But there are other grounds upon which, in my opinion, the relief prayed in this case must be refused.

"It is established by the cases, and by writers of the highest distinction, that the specific execution of contracts in equity, is not a matter of absolute right in the party, but of sound discretion in the court. And unless the court is satisfied that the application to it, for this extraordinary assistance, is fair, just and reasonable, in every respect, it will refuse to interfere, but leave the party to his remedy at law, for a compensation in damages. 2 *Story's Equity*, *secs.* 767, 770. *Corberry vs. Tannehill*, 1 *Har. & John.*, 224. *Seymour vs. Delancey*, 6 *John. Ch. Rep.*, 222.

"Now what is the nature of the application in the present case? and how is the court to afford the redress which is asked from it? The promise charged in the bill, and established by the evidence, if indeed, any promise is shown, was to the surviving complainant, and his late wife, then *Miss Somerville*, and was unquestionably intended, if made at all, to provide for them and their children, if any should be born, a support. But the wife is dead, and there is no issue of the marriage; and the surviving husband now claims to have this contract specifically enforced for his exclusive benefit, although he has received in another form, and by the will of his grandfather, property to a much larger amount. The contract asserted in the bill, it will be observed, is not merely a contract to convey title to a certain parcel of land, but embraces an engagement to stock it, to pay the debts of the grandson, and support him and his family for the first year after their marriage. Now this contract, if enforced at all, as is said in the cases, is to be enforced *ex vigore*, and with unmitigated severity. It must be carried into execution at all its points, though a part of the consideration has unquestionably failed, by the death of the wife, childless; as it is impossible to suppose, if the grandfather ever did make

such a binding engagement as is contended for, that the wife and children were not in his contemplation, and constituted in part, at least the motive for his promise. It seems to me eminently proper, that a case like this should be sent to law, where, in the language of *Chancellor Kent*, in *Seymour* and *Delancy*, 'relief can be afforded in damages, with a moderation agreeable to equity and good conscience, and where the claims and pretensions of each party can be duly attended to, and be admitted to govern the assessment.'

"And in this case, there is a peculiar reason why the power of the court should not be exerted in the form in which it is applied. The contract we have seen, is not confined to real estate, but extends to goods and chattels, and the payment of debts, and it is certainly a general rule, that with regard to contracts, respecting goods and other things of a merely personal nature, this court will not decree a specific performance, except in cases in which a court of law could not give adequate compensation in damages. Unless, therefore, in contracts relating to personal estate, it is clearly shown, that adequate compensation cannot be given by an action at law, chancery will not interfere. 2 *Story*, *secs.* 716, 717, 718.

"This court then looking to all the circumstances of this case, seeing that in the state of things which now exist it would be impossible to frame a decree, which would do justice as between these parties, being moreover convinced that the leading motive which induced the grandfather to make the promise, if he did make such promise, can no longer operate, I am not disposed to carry this alleged contract into execution; but will leave the party to his remedy at law, where the jury can afford him the relief in damages, which they may, under all the circumstances, think him entitled to.

"If this court should decree the specific performance of this contract, and direct the title to this property, to be conveyed to the complainant, so as to give him dominion over it, I am persuaded I should be doing that which his grandfather never intended, and for which, as I think, there is no sufficient justification in the proof, for not a single witness has spoken of the

nature or quality of the title which the complainant was to receive. And if we are to judge from the will of the grandfather, dated but two months after the marriage, and the charter of the interest which the complainant takes under it, there is the strongest reason for thinking, that the absolute transfer to him, of the title to this property, would be most repugnant to the intentions of the grandfather, then or previously entertained.

"There is, besides, another view fatal to the right of the complainant to a decree.

"The property involved in this case, is estimated at about nine thousand dollars, and the entire estate of the testator, of the income of which the complainant is in the enjoyment of one-third, after the payment of some small annuities, is valued at about $150,000.

"It is contended by the defendant's counsel, that this devise of the income, must be considered as a satisfaction of the contract, if one was made, to convey to the plaintiff the property in dispute in this case; I do not think this position can be maintained upon the authorities applicable to the subject. It is settled, that if the interest which the creditor takes by the will is not *ejusdem generis*, not being co-extensive with, or of the same nature of that to which he is entitled from the testator as his debtor, the legatee will be entitled to both interests. 2 *Rop. on Leg.*, 46, 48.

"But although, in my opinion, the interest which this complainant takes under the will of his grandfather, cannot be regarded as a satisfaction of his claim founded upon the alleged contract, I yet think the will puts him to his election, and that he cannot claim under the will, and under the contract also.

"There can be no doubt that the degree of intention necessary to raising a case of election, must plainly appear upon the face of the will, but then the court is not to disregard what amounts to a moral certainty of the intention of the testator. *McElfresh vs. Schley & Barr*, 2 *Gill*, 181.

"And though evidence dehors the will, will not be admitted to prove or disapprove such intention, there seems to be no valid objection to such evidence to show the state and circum

stances of the property. *Judd vs. Pratt*, 13 *Ves.*, 168. 2 *Roper on Legacies*, 390.

"Now can there be a doubt that the testator did intend to dispose of this property as his own?

"He took the deed to himself on the 17th February, 1846, and on the 2nd of April following, he made his will, by which he devised to the trustee his whole estate of every kind and description. I throw out of view his declaration to Mr. Poe, which has been excepted to; but I suppose the fact of his taking the deed to himself, is evidence to show the state and circumstances of the property.

"Now is it not morally certain, that the testator intended to dispose, by his will, of this property? and is not that intention apparent upon the face of the will itself, especially when taken in connection with the state and circumstances of the property? He unquestionably had the legal title, and his intention, as it appears to me, might be as well disputed, to dispose of any other part of his estate as this.

"There is another intention also manifest upon the face of this will, which would be frustrated by the success of this attempt on the part of the complainant, and that is, to place the grandchildren on a footing of entire equality. It is perfectly clear that the testator intended to give to each the same precise interest in his estate, in regard alike, to quantity and quality, and to permit this arrangement to be distributed, would be to defeat a cherished object of the testator.

"The rule as asserted by the Court of Appeals in the case of *McElfresh vs. Schley and Barr*, is, "that a man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument," &c., and, as according to my view of this case, the complainant is now attempting by this bill, to violate this rule, I should, on this ground, if none other existed, refuse him relief."

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, Martin, and Frick, J.

PRATT and NELSON, for the appellants, contended:

1st. That the contract proved by the testimony in the cause, is substantially that set out in the complainants' bill.

2nd. That said contract was founded upon a valuable consideration, was in part performed by the grandfather of the complainant in his lifetime, and that the complainant is entitled to a decree for its specific and complete execution.

3rd. That the death of the wife of the appellant, pending the proceedings, does not impair in any wise his rights under said agreement.

4th. That said contract is not affected by the provisions of the statute of frauds.

5th. That the provisions made for the complainant, by the will of his grandfather is no satisfaction of said contract.

6th. That the complainant, under the circumstances of this case, is not bound to elect, whether he will take under the will of his grandfather, or under the agreement, but that he has a right to take the provision made for him by the one, and to ask a specific execution of the other.

J. M. CAMPBELL and THOMAS S. ALEXANDER, for the appellees, insisted:

1st. That the deceased, *Charles Waters*, never made any such agreement as is alleged in the bill.

2nd. If he did, his will has more than fulfilled it.

3rd. That in any event, as the will carries the property claimed under the agreement; the appellant, taking a benefit under the will, cannot claim against the will under the agreement.

4thly and lastly. That if the agreement were made as alleged, and is yet unperformed, and may be enforced notwithstanding the will, the appellant is entitled to no more since the death of his wife, without issue, than a life estate in *Moore's* farm, and as to the residue of the property mentioned in the agreement, has no remedy in equity.

FRICK, J., delivered the opinion of this court.

The object of the bill filed in this case by the appellant and *Rebecca Ann Waters*, his wife, (since deceased,) is to enforce the performance of a contract alleged to have been made with the complainant, by *Charles Waters* the grandfather of *Charles A. Waters*, in which it is charged: That the grandson, with the sanction and encouragement of his grandfather, having made proposals of marriage to *Miss Somerville*, *Charles Waters*, the grandfather agreed: that if such marriage should be consumated, he would purchase and fully stock a farm for the complainants, would pay all the debts of his grandson outstanding, and would furnish adequate means for the support of him and his wife for the first year thereafter. And this promise and engagement being communicated as well to *Miss Somerville* as to her mother and brother, the marriage was afterwards, on the 4th of Feb., 1846, duly solemnized.

It is further alleged, that shortly after the marriage, *Charles Waters*, the grandfather, in part execution of the agreement, purchased a farm in *Baltimore* county, and put the complainant in the possession thereof; and also in part stocked it with furniture, implements and slaves; soon after which he died, before paying complainant's debts, without having executed a deed for the land, and without *fully* stocking the farm, and supplying the means of support for the year ensuing the marriage.

The bill then sets out the will of the grandfather, *Charles Waters*, by which, after a proper provision for his wife for life, he devises all the residue of his estate to *Freeborn G. Waters*, in trust as to one-third of the income thereof, for *Charles A. Waters* for life, with remainder to his children in fee, if any living at his death; and if none, then to his two granddaughters, *Eliza A.*, the wife of *Charles Howard*, and *Rebecca A.*, the wife of *Charles White*, and their children. And as to the remaining two-thirds, the income thereof for the use of these granddaughters respectively for life, with like limitations as contained in the devise to his grandson. Each of the granddaughters had one child. All these parties are made defend-

ants to the bill, and the prayer is, that they may be decreed to convey to the complainants, the farm in question, and that the executor, (who is the trustee also,) be compelled to pay the debts due by the complainant at the time of the marriage, and in all other respects, execute the remaining stipulations of the contract.

The defendants by their answers insist: that although the farm in question was purchased and stocked, and complainants put in possession by the grandfather, yet that the contract to this intent, if any was made, was only to give to the complainants the *usufruct* of the farm and other property, and not the absolute fee.

That the habits of the grandson were unthrifty and extravagant, and so known to the grandfather; and the aid proposed to be given, was only in the hope and upon the condition that he would reform his vicious habits, which he never did. That to have conveyed to him the title in fee, would have enabled the complainant to have defeated the prominent object of the grandfather, in view of the provision he intended for the complainant and his issue; and further, that it was never the design of the grandfather to place the complainant on a better footing with regard to his estate, than his sisters.

The defendants further aver, that only a few days after the marriage, on the 17th day of February, 1846, the property here claimed by the complainants, was, by his own direction, conveyed to the grandfather in his own name, while the complainants were in possession; that it was regarded by him as a part of his estate at the time, and passed under his will as a portion of what was devised in trust for the grandson and his two sisters; and that the provisions thus made for the complainant, *Charles A. Waters*, by the will, is a full performance of any agreement made in contemplation of his marriage.

The will of the grandfather was executed on the 2nd of April, 1846; and it is admitted that the entire estate of the testator, including the property here claimed by complainants, was nearly $150,000; and the property claimed under the

alleged agreement with the complainants, is valued altogether at the sum of $9,000.

The chancellor, upon the whole case presented to him, determined that the complainant had made out no claim for the interposition of a court of equity, and dismissed the bill; and this decision we are called upon to review.

The true inquiry here is, whether the alleged agreement of *Charles Waters*, the grandfather, in consideration of the marriage proposed and consummated between the complainants, is sustained by the evidence in the cause; and how far such an agreement, according to the principles which govern a court of equity in enforcing a specific execution, will entitle the complainant, under all the circumstances, to the interposition which is here sought by him?

Marriage has always been held in the law to be a good and valuable consideration to sustain a contract. But the contract must be one certain in all its particulars; so clear and definite, and so far satisfactorily proved, as to be capable of specific execution. If it be a parol contract, to take it out of the statute for part-performance, the terms must be definite and unequivocal. If uncertain or ambiguous, a specific performance will not be decreed. For the court may enforce precisely what the parties never did intend or contemplate. 1 *Story's Eq. Juris., secs.* 764, 767.

Now what was the intention stamped upon all the evidence in this case?

The grandfather was made aware of the attachment of his grandson to the lady whom he afterwards married. He was before, fully advised of his erratic and extravagant habits. But he approved of the engagement, and as is proved, used every persuasion and inducement to encourage an union between them. He regarded it as the probable means of reclaiming him; and with that view, in all sincerity did make to the parties and their friends, the pledges and declarations which are proved by the witnesses, and also contained in the letters filed in evidence in the cause.

In all the testimony, there is nothing inconsistent or conflict-

ing with the theory, that he intended to buy a farm, to stock it and furnish it, to place him upon it, pay his debts, and give him a start in the world, (as he expressed it;) without designing, at the same time, to invest him with the title in fee, and the uncontroled disposition of an experimental provision, directed to his gradual reform and fixed settlement in life. From the whole tenor of the correspondence, it is obvious, that the grandfather reserved to himself full direction, with regard to the manner in which such provision should be made, and the extent to which it was to go.

He might well, in all the language imputed to him, have looked to a permanent provision for the grandson, and yet have reserved to himself the time at which he would so execute it. He agreed to buy a farm and put him in possession. All this he did, promptly by the day designated. He bought the farm. He gave to Mrs. S., the mother of the lady, the money and means to furnish the house, and partially at least, within the short period intervening before his death, sent the stock and negroes from his own farm.

Can it be supposed that when the chief inducement of the grandfather in making these promises, was to reclaim his grandson, and reform his extravagant habits, that he designed to give him the title and right of control over the property, unconditionally, and thus administer means and encouragement to the prosecution of the very course of life which he desired to check? The object of the grandfather would seem more naturally to correspond with the acts done by him in the execution of that object; to put him *in possession* of a farm, and to stock it, not to pass the title to him. View it as a contract, and to this extent it has been fully performed. And as it appears in evidence, the complainant is still in possession, and competent, under the powers in the will to the trustee, to arrange with him for the continued *usufruct* of the property. The will itself, excludes all idea of title in the complainant over any portion of the property, but gives to him a life estate in a share, estimated at more than $40,000, while the whole estimate of the claim asserted by the bill, is set down at $9,000.

What the grandfather intended and promised, he partly executed in his lifetime, and afterwards consummated by his will; to settle them on a farm, or in any other *business* pursuit, to provide for them through life, and secure the ultimate benefit of his bounty to their children; keeping it out of the power of complainant to waste his substance, by placing the property under trust for these purposes. The whole disposition of the estate in his will, would seem to correspond with this presumed intention of the agreement here set up. He had repeatedly declared his intention to see all his grandchildren settled and provided for in his lifetime. In his will he has preferred none; but has shewn his disposition to be equally favorable to all, by giving to each a full and equal share of his estate. And to decree what is claimed here to the complainant, without seeing a clear and unequivocal agreement or declaration to give it, would be to disregard the obvious plans of the testator; to make the distribution of his estate unequal, and defeat and disappoint all the motives which influenced both the alleged agreement, and the testamentary dispositions of the grandfather.

Such is our view of the motives and inducement to this alleged contract. And with this key to the conduct of the grandfather, let us glance at the mass of testimony introduced, and see if it can be sustained beyond this, to raise a contract, such as is sought to be enforced by the bill in this case.

To *William T.*, the brother of *Miss Somerville*, he said: "That he would buy them the *first suitable* farm that offered; would furnish it and stock it, and pay their expenses for a year." Not that he *agreed* to do it. And even if he did, the engagement is wholly indefinite and uncertain. Of the first *suitable* farm, who was to judge as to price and quantity of land? And how was it to be stocked, unless with regard to size and value? No intention is here indicated to make a binding contract; but, (as he expressed it on another occasion,) "to do as he pleased, and buy such a place as pleased himself." In other words, to do what he thought "suitable" for them, and make such provisions as would "give his grandson a fair start;" and make them, (the husband and wife,

comfortable, until the conduct of his grandson would justify his "doing more." When he afterwards purchased *Moore's* farm, could he have supposed that he was bound by a legal contract, capable of being enforced against him, and to execute to them a title, which only fourteen days before the marriage, he took to himself? *Hammond*, it is true, (as other witnesses also,) says, that "he wanted to buy a farm for his grandson." But he has no where said that it was in the performance of any agreemant or contract to do so. To *Mrs. Somerville*, with whom he corresponded on the subject, and with reference to another farm which was proposed to him for sale, about which he was treating, he writes; "*My view is not to confine my grandson on this spot*, if he turns his attention a to business, as I most ardently hope he will; and then if it be want of judgment, it had much better be on a moderate than a large scale." His anxiety was "to fix his grandson on a farm," as is expressed in a letter to complainant himself; and in his letter to *Wm. T. Somerville*, he expresses the same views, and adds: "I would, without delay, buy a first rate farm for him, as I am anxious to fix *all my grandchildren* in my life time, could I collect what has been long due."

Again, in another letter he says: "I am trying to procure a *suitable* farm on which I could establish you." And how far that which he proposed to do, was definite as to the time, the manner, and the extent of the alleged contract, may be inferred from his language to *Mrs. Somerville;* when expressing to him the fears of complainant, that the grandfather would not fulfill his promises, he said, "that *Charles* had better *trust to his generosity*, as he would do every thing that was right."

There is nothing in all this, or in his other declarations, to show that he ever intended to give the staff out of his own hands, or that the complainant had any right to suppose that he so intended.

Therefore, when he says that he will "buy the first eligible farm," and in another instance, "the most suitable farm," it was always in his view "to settle and fix" his grandson, as he contemplated to fix his other grandchildren; not defining any

particular estate he intended to give, or designating any binding and definite terms upon which he meant to fix them. And further, when he proposed to the father of complainant an exchange, by which he proposed to put complainant on the farm held by the father for years, by possession without title, it indicates, most decidedly, that he designed to give nothing beyond the possession for the time, and as an experiment in the promised reform of the habits of the complainant. That all the grandfather's plans were, at that time, directed to this reform, and their final consummation depended upon it, is further illustrated by his language to the grandson, in the first letter of the series: "You ought," he says, "to have felt assured that all I propose doing for you, would most assuredly be done, and, perhaps, much more, *as I saw you progressing.*"

Upon this brief review of a portion of the testimony, all of which we have carefully examined, (and laying no stress, and, therefore, expressing no opinion on the part excepted to,) we have no difficulty in concluding, that the grandfather never meant or contracted to give to complainant, absolutely and in fee, the uncontrolled disposition of this contemplated advancement. But, standing in *loco parentis* to all his grandchildren, he designed, as they fixed and settled themselves in life, to advance them by a provision suitable to their wants and station, in such manner and at such times as his judgment and "generosity" might dictate.

The true intention in this case, was to make a prospective provision for husband, wife, and children. Here the wife is dead, and there is no issue from the marriage. A prominent part of the motive and consideration on which this promise was based, has failed, and the complainant claims to have the whole performed for his exclusive benefit; although he has received what is admitted to be far beyond the value of the claim, in the precise form in which we conceive the grandfather intended, by his promise, to signify his bounty in his lifetime. He never made an engagement binding on him to the extent claimed by the complainant, and exclusive of any consideration of the wife and of the children, that might result from the marriage

To provide for these, was among the prominent motives of the grandfather; and the whole complexion of the case is so far changed by the death of the wife, that a strict compliance with what is claimed as the agreement, becomes impracticable. With this motive in view, it is entirely repugnant to it, to assume, even if the wife were still living, that he intended to give such an estate as would embarrass, if not defeat it altogether. That he designed, by his promises, to make, at the proper time, a permanent provision for the complainant, is not doubted. And that he did so, very soon after the marriage, is fully demonstrated by the date and contents of his will, under which the complainant receives *more* than a full equivalent for any engagement or promise which the grandfather ever made to him. The whole case discloses, that he was not an unwilling, but a generous grandfather, anxious for the reformation of his grandson, and with a disposition eminently liberal and kind to complainant, as to all his other grandchildren. He intended to secure to him, and any family he might have, a fair provision, in the event of his becoming settled and fixed in life; and this is as much as he bound himself to do, under any promise that appears upon the testimony. He has liberally done so by his will, and every fair presumption is against the idea, that he ever intended to secure to the complainant a double portion in his estate. For, in his declarations, he uniformly included the other grandchildren with the complainant, in his views and designs of providing for them all, and in his will, he has treated them all as equals, and disposed of his whole estate; and, to enforce this alleged agreement in the form claimed by the complainant, must defeat the manifest intention of the testator, apparent on the face of the will.

The case before us, is clearly to be distinguished from that of *Dugan, et al., vs. Gittings*, 3 *Gill*, 138. There the property, both before and after the marriage, was affirmed by the father to belong absolutely to the daughter and her children. Here the evidence, with all the qualifications with which the grandfather surrounded it, cannot be tortured into an absolute gift in fee. In the case of *Dugan*, the testimony established

the delivery of the house to his daughter, as her own property, prior to the marriage, and that he verbally presented it to her in fee, as a marriage portion. That she continued to reside in it for some time, and after leaving it, was in the enjoyment of the rents and profits (sometimes paid to her by the father himself,) up to the time of his death; *and he made no further provision for her in his will.*

The case there presented, was, therefore, a strong case for the interposition of the court; and, in the exercise of a sound discretion, inherent in a court of equity, they will look to the object and intention to be derived from all the facts and circumstances, and decree equity upon the whole case. It is scarcely necessary to reiterate, that even if a contract is sufficiently established or admitted, it still remains with a court of equity, as matter of sound discretion, whether, under the circumstances, they will decree the specific performance. 4 *H. & McH.*, 252, *Simmons vs. Hill.* 1 *H. & J.*, 224. 2 *H. & J.*, 76. They may exercise a sound, reasonable discretion, governed by rules and principles, as far as may be, yet granting or withholding relief, where these rules and principles will not furnish any exact measure of justice, according to the circumstances of each case, or where the decree, under the circumstances, would be inequitable. 2 *Story's Eq. Juris.*, *secs.* 742, 769.

Now, here, supposing a contract to be made out. The wife has died since the filing of the bill, and without issue, and the survivor now continues to claim the benefit of a marriage contract, which marriage has ceased to exist, and a provision intended for children, where there are none. If, by the death of the wife, without issue, the complainant has suffered no injury or prejudice by what has been done toward the promised provision for his wife, equity will not interpose. 2 *Freem.*, 35, 36. 3 *Ves.*, 246. See, also, *Baldwin's Rep.*, 489, 490.

And, entertaining the opinions before expressed, with regard to this alleged contract, and its purpose and design, we should do violence to every sound principle of equity and justice, if we consented to enforce it. Looking to all the facts, the original position of the parties, the altered state of things as they

now exist, the impracticability of framing any decree conforming to the original facts and motives that induced the proposed arrangement, and regarding the provisions of the will as more than an equivalent for any obligation to the complainant, by which the grandfather was ever bound, we can find no justification for such a course. Only a short time after the marriage, he executes this will, having previously taken to himself the title, in fee, to *Moore's* farm, then in possession of complainant; and in making his final declaration of intention, says: "I have endeavored, in the foregoing disposition of my property, to do full justice to my family, and to distribute and vest my estate in such manner as would be most likely to ensure a continuance of competence to my descendants, and to guard, as far as possible, against improvidence and mismanagement." This is precisely in the same tone and spirit in which his intention and views were expressed, with regard to the previous provisions for this marriage; and if he has not fulfilled that provision to the letter, he has substituted another much larger and more beneficial, and one that wholly excludes the idea of a double portion to complainant. *Story's Eq. Juris.*, *secs.* 1106, 1109.

Conceiving, therefore, that to gratify the alleged claim here set up by complainant, would be repugnant to the whole tenor of his grandfather's promises and declarations, in seeking to promote the grandson's reform and advancement in life, we are of opinion, that the decree of the chancellor should be affirmed.

DECREE AFFIRMED.

Martha Young, Adm'x of Notley Young, Ex-parte.—*December*, 1849.

In analogy to the practice of allowing executors the counsel fees expended in the successful defence of a will, an administrator will be allowed like fees out of the estate, where his right to a controverted administration is successfully established.

Under our testamentary system, the right to administer cannot be delegated. The policy of the law, in selecting persons nearest in interest, in preference to others more remote, was to bind up the interest of the administrator with that of persons entitled to the estate.

Appeal from the Orphans court of *Prince George's* county.

The appellant, as administratrix of *Notley Young*, filed her petition in the said orphans court, stating that *George H. Smith*, and *Eloise*, his wife, pretending that they were entitled to administer on the personal estate of said *Young*, filed a petition in said court, praying that letters of administration might be granted to them; in consequence of which, and for the benefit of said estate, your petitioner was compelled to employ counsel, for the purpose of answering said petition, and resisting such illegal claim. That this claim was successfully resisted in the orphans court, and the sum of $295 was paid by petitioner to her counsel, for their services in said court. That said *Smith* and wife having appealed to the Court of Appeals, your petitioner paid the further sum of $300, for services of counsel in the latter court, where the judgment was affirmed. These sums she prays to be allowed, as credits in her accounts as administratrix, out of said personal estate.

This claim the orphans court rejected, and passed a decree dismissing the petition, from which this appeal was taken.

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, Martin, and Frick, J.

By Semmes, for the appellant, and
By C. C. Magruder, for the estate.

FRICK, J., delivered the opinion of this court.

The question presented by this appeal is: whether the appellant can claim to be credited, in her administration account, the amount of counsel fees disbursed by her, in maintaining her right to administer the estate?

It is insisted, by the respondents to the petition of the appellant, that the allowance of such a claim is not warranted by any of the provisions of the testamentary laws of the State; and that being a mere personal right, the estate ought not to be burthened with the costs of any controversy between the parties litigating it.

On the part of the appellant, the allowance is claimed in analogy to the practise of allowing to executors the counsel fees expended in the successful defence of a will. That practise is well established and conceded; and we can see nothing that ought to exclude the case of an administrator from the application of the same principle, where his right to a controverted administration, is successfully established.

The appointment, and the rights of administrators, are regulated by law. There must be some sufficient reason, then, in designating the particular parties, in their order, to whom the administration of the estate is committed. The trust and confidence created by a testator in the selection of his executor, is in the case of an administration, created by law. The custodiary, in his relation to the person and estate of the intestate, is distinctly designated, first, to prevent litigation about the possession, and secondly, "for the security of the estate;" and under our testamentary system, this right cannot even be delegated. The persons nearest in interest are selected in priority to others more remote, and it is obvious that the policy of the law was to bind up the interest of the administrator with that of persons entitled to the estate. 8 *G. & J.*, *p.* 84, *Hoffman vs. Gold.*

Where this right is contested, what is the party entitled, under the law, to do? His relation to the estate, binds him to defend it. But, in the view of the respondents, he must either engage in the controversy at his own personal cost, or abandon the

right. An obstinate and pertinacious claimant thus presenting himself, may drive every legitimate party from the contest, and defeat the whole policy of the law in its selection of the proper person to administer. The prospect of an expensive litigation, may thus avail upon a spurious pretext, to secure to a stranger the administration of an estate to which he can have no claim.

After letters have been issued, it is conceded that counsel fees are properly allowed, in prosecuting and defending claims, in the discharge of the duties of the administration. The warrant for this, is found in the act of 1798, ch. 101, sub. ch. 10, sec. 2, which authorises expenditures to be incurred "in the recovery or security of any part of the estate." The principle upon which the rightful party, designated by law, claims the administration, and incurs the expense of securing it, must be presumed to be the same—the recovery and security of the estate from the claim of one who has no legal right to disturb it. There is no force in the objection, that it is a mere personal right, and the party may elect to claim or abandon it. His election is worthless to him, when you take from him the proper means to assert it. Before he can execute the office with which the law clothes him, he must establish his right to exercise it. If this right is controverted, on grounds over which he has no control, and not occasioned by his own default, and he succeeds in maintaining it when litigated, he is entitled to such costs and expenses as the court may find he has *reasonably* incurred; and the decree of the orphans court, dismissing the petition, is, therefore, reversed.

In thus sustaining the petition in this case, this court do not intend to assert the right of the petitioner to the allowances claimed. Of the proper occasion for the employment of counsel, and of the amount proper to be allowed, the court alone are to judge; the ground of this opinion being that the orphans court have the power (which has been denied in argument,) to award reimbursement to a successful claimant of the right of administration.

DECREE REVERSED, AND
CAUSE REMANDED.

John M. Wahl *vs.* Benjamin C. Barroll and Nicholas C. Spence.—*December*, 1849.

A covenant in a sub-lease of part of a lot of ground, subject to a ground-rent of $75, that the sub-lessee should hold the sub-demised part "free and clear of any other or greater rent than that reserved in the sub-lease," does not run with the land, or bind or charge the residue of the lot with the whole rent of $75, and exempt the sub-leased portion from liability for any part thereof, but with respect to such residue, is a mere personal covenant.

Though this covenant does not run with, or bind the residue, yet it does run with and bind the reversionary interest of the sub-lessor in the sub-leased part, and as against the sub-lessor and his assigns of such reversion, the sub-lessee and his assigns would have their remedy if charged with any other or greater rent than that specified in the sub-lease.

The sub-lessee having, himself, become the assignee of the reversion of the sub-leased lot, the sub-lease and all its covenants are, by operation of law, merged and extinguished, and he holds in the same manner and upon the same terms as if no sub-lease had been made, and he had acquired title by regular assignments from the original lessee.

The words "subject to the originally reserved ground-rent," used in an assignment of a lease, are words of description, and not of contract: if they were omitted, the assignee would still be bound to pay the rent reserved in the original lease.

Appeal from the *Court of Chancery*.

The bill in this case was filed by the appellant against the appellees, on the 20th of October, 1846. The facts of the case are fully stated in the opinion of the chancellor, and of this court.

On the 22nd of July, 1847, the chancellor (Johnson,) passed a decree dismissing the bill, accompanied by the following opinion:

"On the 11th of April, 1833, *Micajah Merryman* leased to *John J. Gross* and *John Gross*, a lot of ground in the city of *Baltimore*, for ninety-nine years, with a clause for renewal, reserving an annual rent of $75. *John J. Gross* subsequently purchased the undivided interest of *John Gross*, and then, by indenture dated the 12th of August, 1841, underlet a part of the demised premises to *John Ryland*, for the residue of the

term aforesaid, the said *Ryland* paying for the part so underlet, the annual sum of $37.50, and with a covenant on the part of the lessor, his executors, administrators, and assigns, that on the payment of the rent, &c., the sub-lessee, his executors, administrators and assigns, should enjoy the premises "free and clear of the claim and demand of any person or persons whatsoever, for and on account of any other or greater rent than above reserved thereon." On the same day, *Gross* assigned and transferred to *Daniel B. Banks* his title to the demised premises, and the rent reserved thereon, for the consideration of $400, paid him by *Banks*. *Ryland*, the sub-lessee of *Gross*, died, and *Banks*, as his administrator, sold his interest in the demised premises to the complainant; and afterwards, on the 23rd of September, 1843, for the consideration of $650, he (*Banks*,) sold and conveyed to the said complainant all the interest in the premises which he acquired by his purchase from *Gross*, including, of course, the yearly rent of $37.50, reserved thereon in the lease from *Gross* to *Ryland*. By reason of all which, as it is insisted on the part of the complainant, he became entitled to hold the property mentioned in the sub-lease discharged of the original rent, or of any portion thereof, and that the whole sum of $75, the rent reserved in the lease from *Merryman* to *Gross*, became charged and chargeable upon that portion of the premises not embraced in the said sub-lease. Afterwards, on the 29th of September, 1843, the said *Gross* and *Banks*, to whom *Gross* had mortgaged the premises, conveyed to *Benjamin C. Barroll*, one of the defendants, for value, the residue of the said demised premises, not embraced in the lease to *Ryland*, subject to the ground-rent reserved in the original lease; and on the 30th of January, 1845, *Barroll* conveyed the same property, for a valuable consideration, to the defendant, *N. Carroll Spence*, subject, likewise, to the ground-rent reserved in the original lease, the effect of all which, as alleged by the complainant, was to make *Barroll* and *Spence*, the defendants, equitably liable to the landlord, *Merryman*, for the whole amount of the rent reserved in the original lease, and not merely for a proportional part thereof, they having had

notice, as alleged, before they received transfers of the property, of the actings and doings of *Gross*, in relation thereto, but that, nevertheless, the complainant has been compelled to pay to the original lessor, *Merryman*, divers sums of money, which are mentioned in the bill; they, the defendants, having refused to pay the whole amount thereof. The prayer of the bill is, that the defendants may respectively be compelled, by decree, to pay the whole amount of the rent which fell due whilst they severally held the premises, and that the portion thereof which was conveyed to them, may be declared liable therefor, during the residue of the term, and that the complainant may hold and enjoy his part free and discharged from any part thereof.

"The defendants, in their answer, deny the jurisdiction of a court of equity to decree the relief asked for by the bill, and as, after attentively considering the question, and the arguments of the counsel on both sides, I concur with them in that opinion, I do not consider it necessary to say anything upon the other question which has been drawn into the discussion. I am very clear that I have no power to declare, that any part of the demised premises shall be exempt from the claim of the original lessor, *Merryman;* for, though a sub-lessee may not be liable to be sued for rent on the covenants of the lease, he is certainly liable to be distrained for the rent during his possession. 2 *Story's Equity*, *sec.* 687. To decree, then, that any part of the premises shall be discharged from the payment of the rent, would be an invasion of the right of the landlord, and is, therefore, inadmissible. That part of the relief prayed by this bill, which seeks to exonerate the premises held by the complainant from the payment of any part of the rent, cannot, consequently, be granted.

"With regard to the prayer to have refunded to the complainant the rents which he has been compelled to pay to *Merryman*, the original lessor, I am of opinion that there is an adequate legal remedy, and, consequently, that this court has no jurisdiction. Assuming that the complainant is right in supposing that, according to the instruments under which he holds, the premises embraced in the lease from *Gross* to *Ryland*

were to be exempt from the payments of any portion of the rent reserved by the lease from *Merryman* to *Gross*, that such was the contract of *Gross*, and that the defendants stand in his shoes, and are to be considered as having contracted to pay the whole rent to *Merryman*, it seems to me to follow, that if the complainant has been compelled to pay any part of that rent, the appropriate remedy is an action at law to recover back the money. It is not like the cases which have been referred to, in which it has been decided, that if one of several persons, who have purchased different parcels of land, liable to a rent charge, is made to pay the whole, he shall be eased in equity, by a contribution from the rest of the purchasers. 1 *Equity Cases*, 113. But this is a bill by a party who, denying his liability to pay any part of the rent, seeks not to make the other purchasers contribute, but to pay the whole amount, which, he alleges, he has been improperly made to pay. It is, as it seems to me, a bill to recover a sum of money which the complainant has paid, laid out and expended for the use of the defendants, for which, of course, the courts of law afford an adequate remedy, and if so, authorities need not be cited to prove that this court cannot interfere. Being of this opinion, I consider it proper to dismiss the bill. It is admitted that *John J. Gross* is insolvent, but that cannot, I think, make any difference. The attempt is to make the defendants pay the several sums of money which the complainant has been compelled to pay, but for which he insists the defendants are liable. If this be so, I am at a loss to see why the courts of law are incapable of affording an adequate remedy. *Adair vs. Winchester*, 7 *Gill & John.*, 114."

From this decree the complainant appealed.

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, Martin, and Frick, J.

By Geo. M. Gill, for the appellant, and

By Alexander and Barroll, for the appellees.

DORSEY, C. J., delivered the opinion of this court.

On the 17th of April, 1833, *Micajah Merryman, Jr.*, by indenture of lease in the usual form, demised a lot of ground therein described in the city of *Baltimore*, to *J. Gross* and *J. J. Gross*, for ninety-nine years, renewable forever, reserving a yearly rent of $75. Soon after, *J. Gross* assigned and conveyed all his interest in the demised premises to *J. J. Gross*, his joint lessee. On the 12th of August 1841, *J. J. Gross* sub-leased about a moiety of the said lot to a certain *John Ryland*, for the unexpired term of the original lease, save one year, reserving to the sub-lessor, his executors, administrators and assigns, the yearly rent of $37.50, who covenanted, that upon the payment thereof, &c., the sub-lessee should hold the sub-demised premises free and clear of any other or greater rent. And on the day last mentioned, *J. J. Gross* assigned the ground-rent issuing out of the sub-demised premises, and his reversionary interest therein, to one *Daniel B. Banks*. *John Ryland* having died intestate, *D. B. Banks*, his administrator, assigned all the decedent's interest in the sub-lease to the present complainant; and sometime afterwards, to wit, on the 21st of September, 1843, assigned to him also, with the said last mentioned ground-rent, the reversionary interest under the original lease, which *D. B. Banks* had in the sub-leased lot. On the 29th of September, 1843, *J. J. Gross* assigned to *Benjamin C. Barroll*, in the usual form, all the residue of the lot leased to him by *Merryman*, not included in the sub-lease to *Ryland*, subject to the payment of the ground-rent in the original lease. *J. J. Gross* having become insolvent, *B. C. Barroll*, on the 13th of January, 1845, assigned all his interest in the premises to *Nicholas Carroll Spence*, the other defendant. The complainant, since the acquisition of his title as aforesaid, having been compelled, since the acquisition of title, as above mentioned by *B. C. Barroll*, to pay a portion of the rent reserved in the original lease from *Merryman*, and to make a like payment, since the assignment from *Barroll* to *Spence*, filed in the chancery court the bill before us, against the defendants, *Barroll* and *Spence*, to coerce them

to reimburse him the amounts by him paid as aforesaid to said *Merryman*, and to obtain "an indemnification from the lot of ground assigned, as aforesaid, to the said *Nicholas Carroll Spence*, against all responsibility for the whole of the said yearly rent of $75, and to have the said yearly rent paid out of the said lot of ground so owned by the said *Nicholas Carroll Spence*, and to have the portion thereof owned and possessed by the said *Nicholas Carroll Spence*, charged with the whole of said yearly rent." *Micajah Merryman* not having been made a party to these proceedings, it is apparent that the complainant seeks not to impair or change his rights, to collect his rent from any part of the lot by him originally leased to *J. Gross* and *J. J. Gross*.

To show his claim to the relief sought, the complainant insists, that the covenant of *J. J. Gross*, in the sub-lease made to *Ryland*, that he should hold the lot thereby demised, free and clear of any other or greater rent than that reserved therein, was a covenant running with the land, which bound the residue of the entire lot leased by *Merryman* to *Gross*, and charged it with the whole rent of $75, reserved to *Merryman;* and exempted the lot sub-leased to *Ryland* from liability for the payment of any part thereof. For such a principle no authority has been referred to, which gives to it the slightest support. And the reverse is satisfactorily shown by the case of *Cook vs. the Earl of Arundel, et alios*, reported in *Hardress*, 87. Where it was held, that if a party holding lands charged with a ground-rent, grant part of those lands, and covenant that the lands granted should be discharged of the rent, it is not a real covenant which runneth with the land, and chargeth the land not granted with the whole rent: the court being "clear of opinion, that it was no more than an ordinary and personal covenant, which must charge the heir only in respect of assets, and not otherwise, and thereupon the bill was dismissed." Which bill was filed to charge the land not granted with the entire rent.

Although the covenant to *Ryland*, as to exemption from any other or greater rent than that reserved in the sub-lease,

did not run with or bind the residue of the lot not sub-demised to *Ryland*, in respect to which it was regarded as a mere personal covenant; yet it did run with, and bind the reversionary interest of *Gross* in the sub-leased lot, and as against *Gross* and his assignees of such reversion, *Ryland* and his assignees would have had their remedy, if charged with any other or greater rent than that specified in the sub-lease. But unfortunately for the plaintiff, he has himself become the assignee of the reversionary title of the lot sub-leased to *Ryland*, which sub-lease he held under assignment, and thereby, by operation of law, as far as the rights of the plaintiff are concerned, the sub-lease and all the covenants therein contained are merged and extinguished, and he holds the sub-leased lot in the same manner, and upon the same terms and conditions as if no such sub-lease had ever been made, and he had acquired title to the lot, and the unexpired term therein, as specified in the original lease, under regular assignments from *Gross*, the original lessee, and those claiming under him. Sufficient authorities for this are found in *Webb vs. Russell*, 3 *T. R.*, 393, and *Hughes vs. Robotham, ex'cr of J. S.*, 1 *Cro. Eliz.*, 303.

The plaintiff appears to regard the assignment of *D. B. Banks* and *J. J. Gross* to *Benjamin C. Barroll*, stating, that the lot assigned was to be held subject to the originally reserved ground-rent, &c., as demonstrating that the lot thus assigned, which passed but about a moiety of the lot originally leased by *Merryman* to *Gross*, should pay the whole ground rent reserved on the entire lot, and that the sub-leased part of the lot should pay no portion thereof. This construction of the contract of the parties cannot be sustained. Had those words, "subject to the originally reserved ground-rent," been wholly omitted in the deed of assignment, the assignee's obligation to pay the rent, stated in the original lease, would have been the same, with or without their insertion. When thus used, they are not intended as terms of compact, creating a new obligation, having no existence without them, but as merely descriptive of the existing condition of the property, designed by the assignment to be transferred to the assignee. And this view of the

subject is fully sustained by the case of *Wolveridge vs. Steward*, 30 *Eng. C. L. R.*, 312: where *A*, by indenture, executed by himself and *B*, assigned to *B* certain premises, "subject to payment of the rent, and performance of the covenants and agreements, reserved and contained in the original lease." *B* entered under this assignment, and afterwards assigned over to a third person. Held, that *B* was not liable in covenant to *A* for rent, which the latter had been called upon to pay in consequence of the default of *B's* assignee, "the words subject to the payment of rent, &c., being words of qualification, &c., not of contract." In the language of *Lord Tenterden*, referred to in the above case, as used in *Mills vs. Harris*, *Michælmas term*, 1820, "Those words were not of agreement, but were merely descriptive of the obligations to which the assignee would be liable, as between him and the lessor."

The decree of the chancellor dismissing the complainant's bill of complaint is affirmed, with costs, as well in this court as in the court of chancery.

DECREE AFFIRMED, WITH COSTS.

JOHN PRICE *vs.* STATE OF MARYLAND.—*December*, 1849.

Where a criminal case is removed to an adjoining county for trial, under the act of 1804, ch. 55, it is sufficient to send a *transcript of the record* to the court to which the cause is removed. The original papers on file in the court, ordering the removal, need not be transmitted with the record, or as the record of proceedings.

The words of the record, "whereupon, let a jury thereon appear before the court, immediately by whom, and so forth," state the *venire* for the the petit jury, and the expression, "ten of which said jurors being called come, and so forth," refers to the impannelling, electing, and trying of the individual jurors, and not to the *venire*.

The proceedings in relation to the petit jury, being gone over in the court to which the cause is removed, any irregularity in such proceedings in

the court ordering the removal, would not be fatal, and no mention need be made of them in the transcript sent to the former court, except for the purpose of showing at what precise stage of the cause the removal was ordered.

The object to be effected by a removal is to secure a fair and impartial *trial*, and if the accused has been arraigned in the court where the cause originated, he need not be again arraigned in the court to which it is removed, the arraignment constituting no part of the *trial*.

The issue made by the accused putting himself upon the country for trial, does not contemplate any particular twelve individuals as the jury, as is manifest from the fact that the arraignment always takes place before the jury is sworn, and often at a previous term.

At common law, as a general rule, a jury must be returned from the county where the offence is committed, but our statute intercepts this rule in case of removals, and directs the issue to be tried by a jury from another county.

There are cases under the *English* statutes, in which, for the trial of offenders, a jury may be taken from a different county, but there is no difference in such cases in the mode of arraignment.

In removals from the King's bench, the *venire* in the indictment remains the same; the place of trial alone is changed.

The appeal to the accused "how will you be tried?" and his answer, "by my country," is a form handed down from the period when the party had the privilege of selecting a trial by jury, or by battle, and to put himself upon the country, was the formal mode of selecting a trial by jury.

In the removal of civil causes, it is not necessary to re-frame the issues in the county where they are removed.

The court to which a cause is removed, has no power to order a writ of diminution to correct the transcript of the record sent to it. Where diminution is suggested, the process should be applied for.

After the right of removal has been once exercised by either party, there can be no second removal. By the express terms of the act of 1805, ch. 65, sec. 49, and of 1809, ch. 138, sec. 20, the removal must be made by the court in which the *indictment is found, and none other*.

The city court of *Baltimore* is vested with all the powers, jurisdiction and authority formerly held and exercised by the court of oyer and terminer for *Baltimore* county, and has authority to remove a cause to an adjoining county for trial.

The court of oyer and terminer possessed, in respect to criminal jurisdiction within the city of *Baltimore*, all the general powers and authority which the several county courts possessed within their respective territorial jurisdictions, and remained unchanged by the amendment to the constitution of 1804, '5.

The county courts in this State, being the only courts of record with general common law jurisdiction, can rightfully exercise all the powers exercised by the court of King's bench in *England*, so far as those powers are

derived from rules and principles of the common law, and are suited to the change in our political institutions, and not modified by our constitutional or statutory enactments.

The power of removal, both of criminal and civil cases, is an acknowledged part of the ordinary common law jurisdiction of the courts of King's bench.

The privilege of removal was first made an object of constitutional security by the act of 1805, which left to the legislature no longer the power to deprive a party of its exercise, but only the power of extending it, or prescribing the *mode* of its exercise.

The practice of removing criminal cases from *Baltimore* city court has been continued since the act of 1805, and has been twice sustained by the Court of Appeals.

The same considerations must govern, and the same result is to be attained by a removal, both in regard to the State and the accused. There is no canon of interpretation which can be applied to the one, which will not apply with equal force to the other.

The object of the removal being to secure a fair and impartial *trial*, the case must be removed before the trial, or any part of it, is had in the court ordering the removal.

The trial can only be said to commence, within the contemplation of the law regulating removals, when the panel of twelve jurors is completed by being duly sworn.

Where a new trial is granted, or where the jury, unable to agree, are discharged, it then becoming necessary to try the case again, *de novo*, the second trial is as much a trial, within the contemplation of law, as the first was, before the party was put to the bar.

Error to *Anne Arundel* county court.

The record in this case states, that on the 22nd of October, 1849, *Baltimore* city court caused to be transmitted to *Anne Arundel* county court, for trial therein, *a transcript of their proceedings* in the case of the *State of Maryland against John Price*, lately depending in said city court, which said transcript is in the words, &c.

This transcript sets out a presentment by the grand jury of the city of *Baltimore*, against said *Price*, for the murder of *George Washington Campbell*, in the usual form, except the omission to state that said grand jury were duly impannelled and sworn.

Then follows the indictment, charging, in the usual form, said *John Price* with the wilful and felonious murder of

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"*George Washington Campbell;*" and then proceeds to state the arraignment of the prisoner in the usual form, his plea of *not guilty*, his putting himself upon his country for trial, and the joining issue on the plea by the attorney general, in behalf of the State. After stating this arraignment, plea and issue, the transcript proceeds as follows:

Wherefore let a jury thereon appear before the court here, *immediately*, by whom, and so forth, and *ten of which said jury* being called, come, that is to say, (naming said ten;) who are severally elected, tried and sworn to say the truth of and upon the premises aforesaid. And afterwards, and before the completion of the said jury, the attorney general filed a suggestion, in writing, that the State cannot have a fair and impartial trial of said case in said court, and praying that the *record of their proceedings* in such prosecution be transmitted to the judges of some adjoining county court for trial, to be heard and determined by such county court, as if originally instituted therein. And the court accordingly ordered the *record of proceedings* of said cause to be transmitted to *Anne Arundel* county court, and then ordered the jurors, sworn as aforesaid, to be finally discharged, which was accordingly done.

Attached to this transcript is the certificate of the clerk of *Baltimore* city court, attested by the seal of said city court, that the foregoing "*transcript*" is a full and true record of the proceedings, &c.

The cause thus removed came on for trial in *Anne Arundel* county court, at its October term, 1849, when the prisoner, by his counsel, moved the court to discharge him without day, because it is manifest, from the record in this court filed, that he was, at September term, 1849, of *Baltimore* city court, put upon his trial, which trial was proceeded in until ten lawful men were called, selected, and sworn as jurors, to try the issue joined between him and the State; and that afterwards, said city court, against his consent, discharged the jurors so sworn without authority of law, so that he cannot again be put upon trial for the offence charged in the indictment set forth in said record. And he further alleged, in support of the above mo-

tion, that after the ten jurors were so sworn, said city court discharged them against his consent, and without authority of law; and without his consent, ordered and directed the *record of proceedings* of said city court, in said cause, to be transmitted to this court. So that this court hath no jurisdiction in this case, because the *record of proceedings* in said prosecution has not been transmitted thereto agreeably to the acts of Assembly in such case made and provided.

Which motion the court (Dorsey, C. J., and Brewer, A. J.,) overruled.

The prisoner, by his attorneys, then filed an affidavit, stating that the transcript of the record of proceedings from said city court was incomplete and diminished in this: that at the May term, 1849, of said city court, a presentment was made against him, charging him with the felonious homicide of *George Campbell;* and that, thereupon, the attorney general filed an indictment, charging him with the murder of said *George Campbell*, which the grand jury endorsed, "true bill;" that upon said indictment, he was arraigned, and plead not guilty, &c.; and that upon his application, the said indictment was continued to the next term of said city court, to wit: the September term of 1849. At which said last term, the grand jury made another presentment, charging him with the murder of *George W. Campbell*, and upon that presentment, the attorney general filed another indictment, charging him with the murder of the said *George W. Campbell*, which the grand jury also returned, endorsed "true bill." Upon said last indictment, he was also arraigned, and pleaded not guilty, &c., and the State joined issue, which a jury was called to try; that he was put to his challenges, and that the regular pannel being exhausted, *tales* were ordered, and summoned, and returned; and he further saith, that these two indictments were for one and the same homicide, and that the first is still on file in said city court, undisposed of, and that there is no mention made of the first indictment in said transcript, nor any mention that any tales were summoned, or any challenges made by him, or the State, and

allowed by the said court. But the court refused to grant a writ of diminution.

The prisoner then filed a suggestion and affidavit that a fair and impartial trial cannot be had in this court, where the said prosecution, as if originally instituted, is now depending, and prayed the court to direct the record of their proceedings to be transmitted to the judges of any adjoining county court, for trial, there to be heard and determined in the same manner as if the said prosecution had been originally instituted therein. Which the court refused to do.

The record then proceeds: And the said *John Price*, (in the custody of the sheriff of *Anne Arundel* county, as aforesaid,) who *had been heretofore, as aforesaid, placed at the bar of Baltimore city court*, as aforesaid, and had then and there been, as aforesaid, asked, how he, of the premises aforesaid, above against him, in form aforesaid imposed, as aforesaid, will acquit himself? had said, that he is *not guilty* thereof, and thereof, for good and evil, put himself upon the country, as aforesaid. And *George R. Richardson*, attorney general, as aforesaid, who prosecuted, as aforesaid, for the said State here, as aforesaid, in this behalf in like manner, and so forth, as aforesaid; therefore let a jury thereon appear, &c.

A jury was then sworn, and rendered a verdict "guilty of murder in the second degree." The traverser then moved in arrest of judgment, and assigned the following reasons:

1st. Because the transcript of the record filed in this court, is not a record of the proceedings in said prosecution, according to the act of Assembly.

2nd. Because said transcript is diminished, imperfect, repugnant and vicious.

3rd. Because he was not arraigned upon the indictment upon which he has been tried in this court, nor has he, in this court, plead to the said indictment, or joined issue thereon with the State.

4th. Because said proceedings have not been heard and determined in this court, as if such prosecution had been originally instituted therein.

5th. Because the court refused to order or grant the writ of diminution referred to in his affidavit.

6th. Because this court refused, upon his suggestion that he could not have a fair and impartial trial in said court, to direct the record of their proceedings to be transmitted to the judges of any adjoining county court for trial.

7th. Because this court had no jurisdiction to try said cause, said *Baltimore* city court having no authority to transmit the record of proceedings of said prosecution to the court here, for trial.

But the court overruled this motion, and passed sentence of confinement in the penitentiary, for fourteen years and six months, upon the traverser, who thereupon sued out the present writ of error.

The cause was argued before Chambers, Spence, Magruder, Martin, and Frick, J.

By Preston and Pitts, for the plaintiff in error, and,
By George R. Richardson, attorney general, for the State.

After argument, the attorney general filed a suggestion, in writing, stating that the transcript of the record sent from *Anne Arundel* county court to this court, is diminished in this, that in reciting the proceedings in *Baltimore* city court, the words "who being impannelled, sworn and charged to enquire for the State of *Maryland*, for the body of the city of *Baltimore*," are omitted in that part of the record which states the withdrawal of the grand jury to make the presentment, and that these words so omitted are contained in the transcript referred to in the record, as sent from *Baltimote* city court. He, therefore, prays for a writ of diminution to correct the record in this particular. This motion was submitted upon the statement by the attorney general, that the error was discovered after the argument of the cause at bar, and was not known when such argument was had. The court ordered the writ of diminution to issue, and the record was accordingly amended.

CHAMBERS, J., delivered the opinion of this court.

This case comes before us by a writ of error, prosecuted to bring into review the proceedings, which have ended in the conviction of the appellant of the crime of murder in the second degree, for which crime he has been sentenced to confinement in the penitentiary for fourteen years and six months. As the party is now in confinement pursuant to his sentence, we have used the very first moment after the case was fully submitted to us by his counsel, to examine into and confer upon the questions of law which his counsel have raised, and with great ability urged in argument. We have now to announce the result of our deliberations.

The offence is charged to have been committed in the city of *Baltimore*, within the jurisdiction of the "city court." In that court the indictment was found and proceedings thereon were had, as set forth in the record, when an application was made by the attorney general, on the part of the State, to remove the cause for trial to an adjoining county court. The cause was removed to *Anne Arundel* county court, where a conviction and sentence were had.

Various objections were urged against the proceedings, both in the city court and the county court, all of which were overruled in the county court, and it is our duty to decide whether there be error in the opinions so expressed. We will consider them in the order in which they are stated on the record.

The first is, that the *transcript* of the record filed in the county court, is not a *record* of the proceedings, according to the act of Assembly of 1804, ch. 55.

It has been suggested by the counsel, that a strict regard was had in our acts of Assembly to the distinction between civil and criminal cases in this respect, using the term "transcript" whenever the proceedings in a civil case were directed to be removed, and the term "record" where a criminal case was spoken of. This, however, upon a minute examination, does not appear to be the case. The constitutional right of a party charged to remove his case for trial, was first secured by the act of 1801, ch. 55, confirmed by the act of 1805, ch. 16.

The third section of the act of 1801, contains the particular language relied on. It enacts, that upon suggestion in writing by the party, to the county court in which the prosecution is depending, "it shall and may be lawful for the said court, to order and direct the *record* of their proceedings in the said prosecution to be transmitted to the judges of an adjoining county court for trial," &c.

Now it is to be observed, that the second section of the same act, in reference to civil actions depending in any county court, provides, that upon suggestion made, as therein stated, "the judges thereof shall and may order and direct the *record* of their proceedings in such suit or action, to be transmitted to the judges of any county court within the district for trial, and the judges of such county court to whom such *record* shall be transmitted," &c.

It is thus apparent, that in reference to this question the language is precisely the same in each section, and it is, of course, not possible to infer that the legislature intended to give to the terms used in the second section, a meaning and effect quite contrary to the meaning and effect of the very same terms in the section immediately following, when, as must be conceded, there is no other expression in the whole act to indicate any such intention. Assuming then, as we feel bound to do, that the language in both sections is to be interpreted as of the same import, we have the uniform and unquestioned practical construction of these terms from the confirmation of the act to the present period. In regard to civil causes, it is matter of no unfrequent occurrence in every district of the State, to transmit such a record of their proceedings as we have in this case. It is confidently asserted, that in no one instance have the original papers on file in the court, from which the cause has been removed, been transmitted with the record or as the record; nor has an objection ever been taken by any member of the court or bar to the established practice. Most of the subsequent acts of Assembly adopt the same construction, by using the words "transcript of record," as synonymous with or, at least, equivalent to the word "record," in the sense of the act of 1804.

The usage also and practical interpretation of the third section, has been equally uniform and as equally without objection, as far as we can learn, except only in the case of the *State vs. Dashiell*, 6 *H. & J.*, 268, in which, as would appear by the report, the counsel suggested this question, but the court, in the opinion given, did not allude to it.

Without meaning to intimate that we should have come to a different conclusion, in the absence of such cotemporaneous, consistent, and uniform judicial interpretation, we certainly feel bound not now to disturb it.

The second objection is to the insufficiency of the record transmitted from the city court, which, it is said, is "diminished, imperfect and vicious."

The defect chiefly relied on to sustain this objection, consisted in the omission to show that the grand jury was duly impanelled, sworn and charged. The amended record shows, that this defect is not in the record as such from the city court, but an error of the copy, made in the office of the clerk of *Anne Arundel* county court, and now remedied by the accurate copy, sent to us in obedience to the process of this court. One of the counsel also urged as an objection, that the *venire* for the petit jurors should be distinctly stated. How far the peculiar mode prescribed by our acts of Assembly, for the purpose of obtaining a jury, should distinguish the form of entry in this respect from the *formula* proper, in a case where a *venire* issues for the particular cause, it is not necessary here to consider. The *venire* is, in express terms, set out in these words: "wherefore let a jury thereon appear before the court immediately, by whom," &c. And the expressions, "ten of which said jurors being called, come," do not refer to the *venire* as it was urged, but to the impanelling, electing and trying ten individuals from the jury ordered to appear. It is certainly not very fully or very technically expressed, but is incapable, we think, of any construction but that here given. Upon this point, however, we have further to remark, that according to the view we have taken of another part of this case, the irregularity would not be fatal, because it could not produce, by

possibility, the slightest injury to the accused. If the cause was properly removed, the proceeding as to the petit jury, however irregular, produced no influence or effect upon the case, so far as that irregularity was committed in the city court, because the whole proceeding in relation to the petit jury was gone over in the court in *Anne Arundel*, precisely as if nothing had been, in that respect, done in the city court. In a word, the whole proceeding was abandoned, and any mention of it might have been omitted in the record as regards any practical consequences arising from it, except in so far as it goes to ascertain the precise stage of the proceeding in the city court when the removal was ordered, and on which is based the question respecting the right of removal after part of the jury was sworn.

The third objection is, that the prisoner was not "arraigned" in *Anne Arundel* county, which it is urged was necessary by the terms of the third and fourth sections of the act of 1804, ch. 55. The language used in each of these sections is, that the judges of the court to whom the record is transmitted, "shall hear and determine the same, *in the same manner* as if such prosecution had been originally instituted therein."

It cannot escape observation, that these words are, in each section, immediately preceded by words emphatically expressive of the purpose for which this authority is given; for the *trial* of the accused. The privilege secured to the party charged or the State, is to have a fair and impartial *trial*. In such *trial*, the court to which the record is sent is to proceed, in all respects, as the court from which it came would have proceeded in the *trial*, in hearing and determining the trial of the cause. It cannot be said nor has it been contended, that the arraignment is a part of the *trial*, but it has been urged, that the party accused, by "putting himself upon his country for trial," in effect selects the jury then attending, or, at all events, a jury of the county in which he pleads, is equivalent in short to a proposal to try his case before a jury then attending the court, or, at least, a jury of the county.

Now, that such an issue does not contemplate any particular

twelve individuals, is perfectly manifest, from the fact that the arraignment always takes place before the jury are sworn, and often at a previous term, and there is no means of ascertaining which of the attending jurors will constitute the panel, or, indeed, whether it may not be composed of *talesmen*, until the process of challenging, trying and swearing the jury has been gone through.

By the common law, as a general rule, a jury must be returned for the trial of the general issue from the county in which the offence is charged to have been committed. When, therefore, a party pleads not guilty and puts himself upon the country, the authorities tell us a jury is to be returned from the county in which the act was committed. But our local law intercepts this rule in a case of removal, and directs the issue to be tried by a jury from another county.

There are cases under the *English* statutes, *vide* 2*nd Hawk. Pl. Cr.*, 559, in which, for the trial of offenders, a jury may be taken from a different county, but we have no intimation of a different form of entry in this respect, or of a difference in any respect in the mode of arraignment.

The language of this appeal to the party, "how will you be tried?" and his answer, "by my country," is a form handed down from the period, when a party accused had the privilege of selecting a trial by jury or, by "ordeal," the "corsned," or by "battle." When asked how he would be tried, his reply determined which of these modes he selected, and to put himself upon his country was the formal mode of selecting a trial by jury. If he selected the trial by battle, he pleaded "not guilty, and that he was ready to defend the same by his body;" and, in fact, besides the plea of not guilty, the party was "arraigned" under the old process of trial by "battle," where there is no trial by jury. *Vide* numerous authorities cited in 2 *Hawk. Pl. Cr.*, 231, *sec.* 30, and 587, *sec.* 3. And in reference to removals from the King's Bench, 1 *Chit. Cr. Law*, 201, it is expressly said, "in these cases the *venue* in the indictment remains the same, and the place of trial alone is changed." Again, we have an illustration from the same provision

in regard to civil causes. When an issue is tendered, the party "puts himself upon the country," and the acceptance of the issue is in similar terms; yet, so far is it from being necessary to reframe an issue in the county to which a civil cause is sent for trial, that it is actually provided in the second section, which immediately precedes that directing the removal of a criminal prosecution, that the civil cause shall be removed at or during the term at which the issues are made up. These remarks also fully answer the fourth objection.

The fifth objection, that the court in *Anne Arundel* refused to issue a writ of diminution, was properly abandoned, as well because there is no power in the county court to issue such a writ in a criminal case, as because in fact, though diminution was suggested, there was no application made for such process.

The sixth objection, that a second removal was not ordered by *Anne Arundel* county court, is not tenable. The words of the constitution are, that "a party presented or indicted in any of the county courts, may apply to the court before whom the indictment may be depending," and have his case removed. There is nothing to indicate a purpose to authorise a second removal. The policy of the law is to have the cause tried in an "adjoining county." This object may be defeated to the almost infinite delay of justice, and the great oppression of witnesses by adopting the argument of the counsel. If a second removal may be had, why not a third, a fourth, and as many removals as there are counties in the State, until, ultimately, the cause, if tried at all, is to be tried at some place the most remote and inconvenient to all who are witnesses or otherwise connected with it, and after a period of time in which the material testimony in the cause had been lost? The law seems to contemplate a condition of excitement in the immediate community, which has been the witness of an imputed crime, productive of feeling, either of prejudice or partiality, which might hazard a fair and impartial trial; but it has not assumed that such excitement will exist in all the adjacent counties, and reliance is, of necessity, had in the integrity and discretion of the court to select such an adjacent county, as is least likely

to be influenced by any considerations of an extraneous character. Here, again, we have an analogy from the corresponding provisions of the same instrument in relation to civil cases. All the argument that has been urged in reference to the design to remove the trial to a place not infected with prejudice, and the insufficiency of the remedy, if not allowed to one party after it has been exercised by the other, will apply with equal force to civil causes, and yet the interpretation of the law was settled contrary to the claim now made, and it is confirmed by express legislative provisions, assuming the construction we now give to this enactment to be the proper one. *Vide* act of 1838, ch. 245. That a further provision in regard to removals in criminal cases would be a very proper one, may be conceded, but it must originate with the legislature, and, if adopted, will doubtless be guarded by limitations, which will prevent its abuse. But we consider this question conclusively settled by the express terms of the acts of 1805, ch. 65, sec. 49, and 1809, ch. 138, sec. 20, in both of which it is expressly required, that the suggestion shall state that a fair and impartial trial cannot be had in the *court in which the indictment is found*, and provision thereupon is made for the removal by the *said* court—the court in which the indictment was found—and by none other.

The next objection urged upon us, is, that the city court of *Baltimore* had no power to remove this cause. In the first place, this power is denied under any circumstances, and in the next, because, if it exist at all, it was not exercised in time.

In the consideration of this question, we do not think the argument should be confined, as it seems to have been, by the appellant's counsel, to a discussion of the constitutional provisions on this subject. It is very proper to regard the condition and authority of the courts in this State, in reference to this subject, prior to, and independent of the amendment adopted in 1804, '5.

The present system by which the city court of *Baltimore* exercises its jurisdiction, was brought into being by the act of 1816, ch. 193, which, in the broadest terms, gave to it "all

the powers, jurisdiction and authority" then held and exercised by the court of oyer and terminer for *Baltimore* county.

The court of oyer and terminer, thus superseded, was established by the act of 1793, ch. 57.

By the second section of that act, "all causes and proceedings relative to the trial of felonies and other crimes depending in *Baltimore* county criminal court, shall be tried and determined before the justices" to be appointed pursuant to the first section. Its jurisdiction was almost entirely confined to criminal cases. The subsequent sections create new felonies, alter the mode of punishment previously inflicted for most crimes, and in many respects create a new code of criminal law for the State. A very peculiar feature in that act, and one which evinces the prominent position occupied by the new court, in the view of the legislature, is, that this criminal code is embodied in various clauses which are worded as if designed solely for the cognizance of that particular court, until, in the twenty-eighth section, the same power and authority are given to the general court, and the several county courts, within their respective jurisdictions, with the exception carefully made of *Baltimore* county court, whose criminal jurisdiction was entirely taken away, and vested in the newly erected tribunal. Thus the justices of the court of oyer and terminer were not only vested with full and ample jurisdiction of all crimes committed in the city of *Baltimore*, but their authority was, by this act, made a sort of standard by which to measure the extent of the criminal jurisdiction of the other courts of the State.

There are other acts of Assembly relating to this court, but they produce no change in its character or jurisdiction, so far as the question now before us is concerned. It so continued at the time of the amendment of the constitution reorganising the judicial system, and for some years after, until, in 1816, it was superseded by the present city court.

Thus it will appear, that when, by the confirmatory act of 1805, the provisions of the act of 1804 became part of the constitution, and the present county courts were substituted for

the general court, which was thereby abolished, the criminal jurisdiction of the State was exercised by the judges of the county courts, except, only, within the limits of the city of *Baltimore*, where it was completely abolished, and in regard to all crimes vested in the justices of the court of oyer and terminer. The new organisation effected by the act of 1805, made it necessary to provide, in detail, for the administration of the new system, and at the same session, ch. 65, this duty was performed with precise minuteness, both in respect to criminal and civil cases. The twenty-fifth section of that act recognised the court of oyer and terminer, and disclaimed any purpose to alter or change its powers and jurisdiction, or to give criminal jurisdiction to *Baltimore* county court. The forty-ninth section, which speaks of the removal by an accused party, requires the suggestion to be made "in the *court* where the indictment is found," and "the *said court*" is to direct the removal; and yet, elsewhere, the *county* court is described by its appropriate title in every instance in which the county court alone, was exclusively the object of the provision.

It would thus appear, that at the very session when the present judicial system for the State was adopted, those by whom it was introduced, regarded and treated the court of oyer and terminer as possessed, in respect to criminal jurisdiction within the city of *Baltimore*, of all the general powers and authority which the several county courts possessed within their respective territorial jurisdictions. Such has been the opinion, we believe, uniformly acted upon from the time of its first existence, now more than half a century, and it is not, and cannot be doubted, that the present city court has all the jurisdiction which the court of oyer and terminer previously possessed.

It has been always held, that the county courts in this State, being the only courts of record with original common law jurisdiction, can rightfully exercise all the powers exercised in *England*, by the court of King's bench, so far as these powers are derived from rules and principles of the common law, and so far as the same are suited to the change in our political insti-

tutions, and are not modified by our constitutional or statutory enactments.

That the court of King's bench has rightfully exercised this power of removal as an acknowledged, if not an essential part of its ordinary common law jurisdiction, both in respect to criminal and civil cases, does not seem to have been doubted in any of the cases in which its exercise is reported to us, of which several may be found referred to in 1*st Chitty's Cr. Law*, 201. It is there said, that "at common law, the court has the power of directing the trial to take place in the next adjoining county, when justice requires it." Why not exercise this power as well as *certiorari* or other common law process, which is of daily occurrence? During the existence of the general court, the process of *certiorari* answered every necessary purpose, and was, in consequence, the familiar practice; but when that court was abolished, and it was considered, as doubtless it must have been, that the courts being of co-ordinate grade, and each equally supreme within its territorial limits, some mode was proper to be adopted as a substitute for the *certiorari* or other common law process, to continue the enjoyment of this privilege. That it was not the intention of those who amended the constitution, to destroy this right, is not a debateable question. They not only express a contrary design, but they make the privilege, for the first time, an object of constitutional security, leaving to the legislature no longer the power to deprive a party of its exercise, but only the power of extending it, or prescribing the *mode* of its exercise.

The argument of the appellant's counsel can only be sustained upon the hypothesis that, by this attempt to place this highly prized privilege upon a more sure and certain foundation, the authors of the amended constitution have singled out the citizens of a certain district of the State, to whom they have denied this privilege of a fair and impartial jury, which they have not hesitated to say, should be secured to all others, by an immutable law. The case now before us is, to be sure, the case of the State, but it must be remembered, that the same considerations must govern, and the same result be obtained, in

regard to the State and the party. There is no canon of interpretation which can be applied to the one, which will not apply with equal force to the other. The apparent inconsistency of attributing to the amendment of 1805, a purpose directly at variance with its avowed object, has led the courts of the State to adopt what we suppose a just interpretation of the law. The practice of sending criminal causes from the city court, has never ceased. The subject has been twice before this court, and on each occasion, the right of removal has been sustained.

The first case, of *State vs. Davis*, 3 *H. & J.*, 154, was during the existence of the court of oyer and terminer. The grounds of that decision have been powerfully assailed in the argument. How far they are tenable, it is not necessary to express an opinion. We concur in the conclusion, so far as the present question is affected.

The case of *State vs. Dashiell*, 6 *H. & J.*, 268, was after the establishment of the city court, and the language of the court seems to be only consistent with the views we have expressed. It is there said: "The constitution directs the removal to another *county*, to avoid the prejudices which may exist in the county where the presentment is found;" and "the act of 1821 declares, the court shall not be bound to remove it to *another* county." Now it is clear, if the constitution had no reference to criminal cases in the city court, the act of 1821 could not be affected by its prohibition. As before said, the legislature had power to add to, or take from its jurisdiction, in this respect, as much as in any other, and this limitation, if to be found in the amendment, could only be in consequence of its being included within the spirit of the particular clause, relating to removals.

The legislative department of the government have also given this exposition in various enactments. The act of 1805, ch. 65, passed at the same session, seems to assume it. The act of 1809, ch. 138, clearly indicates it. The act of 1821, ch. 161, though declared unconstitutional in another respect, directly asserts it. And the act of 1823, ch. 67, and other subse-

quent laws, make provision for costs incurred in such removals; to say nothing of the act of 1840, ch. 211, passed solely for the purpose of prescribing the terms on which it is to be exercised. With such a mass of authority so long and so uniformly acquiesced in, for very nearly half a century, we cannot now feel justified in opposing the first instance of resistance.

But it is urged, that the authority to remove, if possessed by the city court, was not executed in proper time. This brings into review the second branch of this objection, to wit: that the application for removal was too late after a part of the petit jury was sworn.

As before remarked, the object of the removal is to secure a fair and impartial "trial." If the cause is to be removed for *trial*, it must be removed before the trial, or any part of the trial is had in the court ordering the removal. The trial, and all the trial, must be had in the court to which the cause is transmitted. It is manifest, therefore, that the solution of the question depends upon what is to be considered the trial—the commencement of the trial. Of course it is not intended to have reference here to the case of a new trial granted after verdict, or the case in which a jury having had the testimony submitted to them, have been discharged by the court, in consequence either of their inability, after a long time, to agree upon a verdict, or of the illness of any member, or of any other cause which will justify the court in discharging the jury. In these cases, as it is necessary to try the case *de novo*, the second trial is as much a trial, then, within the contemplation of law, as the first was, before the party was put to the bar.

The question here is, had this *trial* commenced when the motion to remove was preferred by the attorney general? My brethren all concur in the opinion, that the trial could only be said to commence, within the contemplation of the law regulating removals, when the panel of twelve jurors was completed, by being duly sworn.

In this opinion I cannot unite. According to my view, the trial commenced when the jury was called, and the prisoner put to his challenge. The respect due to my brothers, must

restrain me from offering an argument, or giving authorities to sustain my own view, and delicacy must prevent any attempt to assign the grounds of the opinion which they have authorised me to express for them. This branch of the objection is, therefore, also overruled.

JUDGMENT AFFIRMED.

PERRY SPENCER *vs.* NEGRO DENNIS.—*December*, 1849.

The case of *The State vs. Dorsey, Exc'r of Worthington*, 6 *Gill*, 388, explained and approved.

The bequest of freedom to a slave is a legacy equal to the amount of his appraised value.

The design of the acts authorising manumission of slaves, was not to foster emancipation, and thereby, as far as practicable, to put an end to slavery, but it was to enlarge the powers and privileges of masters, and to give them an authority to dispose of their slaves in a way which, otherwise, they did not possess.

There has been no material change in the views of the legislature upon the subject of slavery, since the acts of 1715, ch. 44, and 1752, ch. 1, except as to the power of testamentary manumission.

A testator, by his will, devised "that all his negroes be free at the age of thirty-eight years, provided they leave the State within thirty days after they attain said age," "and should they return to reside in the State, my will is, then, that they shall be slaves to my heirs." HELD:

That the conditions attached to this bequest of freedom, are conditions subsequent, and, being subsequent, are wholly unauthorised by the act of Assembly, and, therefore, void.

Testamentary manumission only exists in this State, by virtue of the 13th section of the act of 1796, ch. 67, and can only be exercised in pursuance of the authority thereby given.

Under this act a testator may prescribe the period when manumission shall commence, but he has no power to put an end to a state of freedom, and restore the condition of slavery.

Freedom having once vested, by no compact between the master and liberated slave, nor by any condition subsequent, attached to the gift of freedom, can a state of slavery be reproduced. Nothing short of legislative power, duly exercised, can produce such a result.

Appeal from *Baltimore* county court.

The appellee filed his petition for freedom on the 3rd of September, 1849. The case was submitted to the court below on the following agreement of facts:

That the petitioner was the slave, for life, of *Samuel Brohawn*, of *Dorchester* county, who, by his will, executed on the 19th of August, 1831, among others, made this devise:—"*Item.*—My will and desire is, that all my negroes be free at the age of thirty-eight years, provided they leave the State of *Maryland*, and do not return therein to reside, in the course of thirty days after they arrive to the age of thirty-eight years; and should they return to reside in the State of *Maryland*, my will is, then, that they shall be slaves to my heirs." That petitioner was one of the slaves referred to in said will, and attained the age of thirty-eight years on the 19th of December, 1845, and received a certificate from the register of wills of *Dorchester* county, certifying to the fact of his freedom under said clause, which is recited therein. That in the division of the estate of said *Brohawn*, the petitioner was allotted to his widow, now the wife of the appellant. That after he attained his age of thirty-eight years, petitioner was permitted to go at large, and act as a freeman, until taken by appellant, on the 1st of August, 1849. That the appellant, some time in February, or the 1st of March last, sent for petitioner, and notified him, if he did not give security, or leave the State, he (appellant,) would sell him, as he had stayed longer than the will allowed. That if he would leave the State, he would let him go free. That petitioner made no answer to this notice. That he has never left the State, and never offered to leave it.

The court gave judgment that petitioner was entitled to his freedom, from which defendant appeals to this court.

The cause was argued before Dorsey, C. J., Spence, Martin, and Frick, J.

By Pratt, for the appellant, and

By C. J. M. Gwinn, for the appellee.

Dorsey, C. J., delivered the opinion of this court.

It is insisted, by the appellant, that the case now before us, is settled against the appellee by the decision of this court in the case of *The State vs. Dorsey, Ex. of Worthington*, 6 *Gill*, 388. Whether it be so, or not, we shall presently have occasion to examine. Some doubt having been insinuated in the argument which has just terminated, as to the correctness of the principle adjudicated in that case, it may not be out of place, at this time, to state the grounds of the court's opinion somewhat more at large than was deemed necessary when the decision of that case took place. That the legislature of *Maryland* possess the power of prohibiting testamentary manumission altogether, no lawyer would have the hardihood to deny. It did so prohibit it in 1752, and such prohibition continued for about forty years. It then restored the power, not in furtherance of any State object to be promoted by emancipation, but as restoring a privilege, merely, which for forty years had been withheld from slaveholders. It is equally undeniable, that the legislature, having the authority to deprive slaveholders of all power to make testamentary bequests of their negroes, may grant to them the right to do so, upon such terms and conditions as, in its justice and wisdom, it may see fit to prescribe. And it is equally within the scope of the legislative power, whether such terms, conditions or burdens are imposed upon the testator, the manumitted slaves, or the persons to whom they are bequeathed. In either aspect, the burdens and conditions are alike obligatory.

It is a matter of history, and of judicial cognizance, that, previously to *Worthington's* death, with a view to promote the general welfare, the State had incurred an enormous public debt, which, upon every principle of law and honor, it was bound to pay. That, to make this payment, all the property of the people of the State was bound to contribute, under legislative enactments, its just proportion of the amount to be paid; and that, had the legislature deemed it expedient to do so, it might have enacted, that no property holder should, by last will and testament, make such a disposition of his slave, or

other property, as would exempt it from its contribution of its just proportion of the public burthens. It follows, then, from these undeniable positions, that the legislature of *Maryland* had the power to pass a law imposing the tax to which the Court of Appeals have decided, that slaves, manumitted by a testator, were subjected. Of the morality and expediency of such tax, the legislature was the exclusive judge.

But is there, in point of fact, any injustice or hardship in this tax? or, have manumitted slaves any right to complain of it? We think not. When the immense debt with which *Maryland* has been burthened was created, it was doubtlessly, and correctly too, believed, that the objects accomplished by it, would operate as beneficially to labor as to property—to the laboring portion of the community, as to property holders—and proportionate benefits were anticipated to result to all. At the time this debt was created, we must assume that the legislature looked to the assessment lists of the State, and saw what property there was on which it could impose taxes, in the event of its being called on for the payment of the State debt. For the payment of its just proportion of this debt, every species of property in the State was equally liable, and ought to be made contributory in the way of taxation. A very large item in these assessment lists, was a valuation of slaves. If, then, the legislature, apprehending that the owners were about to remove their slaves without the confines of *Maryland*—beyond the reach of taxation—and, thereby, avoid all just contribution to the payment of the public debt, would it not have been justified; nay, was it not its imperative duty, as the guardian of the rights and interests of other property owners, to prohibit the removal of such slaves from the State, until they had paid into the treasury the two and a half per cent. of their value? that is, their just proportion of the public debt? That it would have been a legitimate exercise of power and duty, cannot be denied. Is it not, then, equally clear, as an act of power and duty, that the legislature, if foreseeing, as it must have done, that a great number of slaves, which ought, in justice, to be charged with the payment of their proportion of the public debt, were about

to be manumitted by their masters, and thus evade the just demands of the State, ought either to prohibit manumission altogether, or to sanction it only upon their payment of their quota of the public debt; that is, the two and a half per cent. upon their assessed values? The unmanumitted slaves remain as such, and are made to contribute ratably to the extinguishment of the public burdens. But it may be said, that the legislature has imposed no such tax upon manumission. It is true, *eo nomine*, it has not done so; yet, giving to its acts for raising revenue that liberal construction which such acts should ever receive, we think it has fully provided the appropriate remedy for such a case. It has imposed a tax of two and a half per cent. on legacies, and we regard the bequest of freedom to a slave, as a legacy equal to the amount of his appraised value. If such a bequest be not a legacy, what is it? It would puzzle the most astute and learned lawyer to find any other head, in a legal nomenclature, under which it could be classed. It was declared to be a legacy by *Chancellor Bland*, in *Hammond vs. Hammond*, 2 *Bland*, 314. "That every devise and every bequest, including the emancipation of slaves, for the gift of freedom to a slave, is a most precious, specific legacy, are specific legacies." That distinguished jurist, the late *William Pinkney*, in his celebrated speech before the General Assembly of *Maryland*, in 1789, in favor of testamentary emancipation, spoke of manumission as a "specific legacy." And this court have so treated it in the case of *Stephen Cornish vs. Jacob Wilson*, 6 *Gill*, 299.

Of what special injustice or hardships had the manumitted slavery in the case of *The State vs. Dorsey, Exc'r of Worthington*, a right to complain? They had accepted of a bequest, charged with a small and reasonable incumbrance, which ought to be discharged, and they are amply reimbursed for its imposition, by the increased value of their labor resulting from the incumbrance.

The acts of Assembly of *Maryland*, authorising the manumission of slaves, were not passed in consequence of any legislative hostility to slavery, or in gratification of any general wish

or policy to diminish or destroy it; or to confer benefits upon slaves, and promote their comforts and happiness; because all observation and experience, in *Maryland*, had demonstrated, that the reverse would be the result; that slaves, for the most part, were far better fed and clothed; more contented and happy; and in point of sobriety, virtue and moral character, far above the free coloured population of the State. But the design of these enactments was to gratify the masters of slaves, to enlarge their privileges, and to give them an authority to dispose of their slaves, in a way which otherwise they did not possess. If the policy of our legislature had been to foster emancipation, and to put an end, as far as practicable, to the continuance of slavery, by the encouragement of manumission, instead of restricting the means of accomplishing it, by rendering all deeds for that purpose void and inoperative, unless signed in the presence of two witnesses, acknowledged before a justice of the peace of the county, of his, (the master's,) residence, and recorded within six months thereafter, it would rather have adopted the policy of the law of *England* in regard to villeins, which makes any act of the Lord, that can be construed into an intention, to treat the villein as a freeman, as "an implied manumission." By the 23rd sec. of the act of 1715, ch. 44, it was enacted: "That all negroes, and other slaves, already imported, or hereafter to be imported, into this province, and all children now born, or hereafter to be born, of such negroes and slaves, shall be slaves during their natural lives." The 3rd sec. of the act of 1752, ch. 1, enacts: "That it shall not be lawful for any person or persons within this province, by any verbal order, or by his, her, or their last will and testament, or by any other instrument of writing, in his, her or their last illness, whereof he, she or they shall die, to give or grant freedom to any slave or slaves; and if any person or persons, after the time aforesaid, shall, by any verbal order, or by his, her or their last will and testament, or by any other writing or instrument, in his, her or their last sickness, whereof he, she or they shall die, give freedom to any slave or slaves, such order, will, or other instrument, shall be void and of no effect.

so far as relates to such freedom or manumission." These enactments show, too clearly to admit of any doubt, what were the general designs of the legislature in relation to slavery, at the time those acts of Assembly were passed. And, except as to the power of testamentary manumission, subsequent legislation has shewn no very material change in the views of the legislature upon the subject of slavery.

But what part of the court's decision is it, that, in the case of *The State vs. Dorsey, Exc'r of Worthington*, it is thought, is decisive of the question now before us? It is that which states, "that the manumission or bequest of freedom to a slave, by last will and testament, confers on such slave the identical rights, interests and benefits which would pass, if the testator had bequeathed the same slave to another person." The inference attempted to be drawn from this expression of the court, is manifestly not warranted by what the court have said, or designed to say. It was speaking in reference to the bequest in the will before it, and was, as its language imports, alluding only to a general bequest of freedom; not to a bequest qualified by conditions, either precedent or subsequent. To such a case it did not, and had no design to make the slightest allusion.

It is also said, that, as the court has declared, that "the manumission or bequest of freedom to a slave, by last will and testament, confers on such slave the identical rights, interests and benefits which would pass, if the testator had bequeathed the same slave to another person," the rights and benefits conferred on the slaves ever afterwards continue his separate property, and as much subject to taxation, or to any proceedings against the manumitted slave, as such slave would be liable to, had he been bequeathed to a new master. In such an argument, there is more of subtlety than of solidity; it pushes the *argumentum ad absurdum* quite beyond its legitimate limits. It might, almost with as much propriety, be insisted, that if the slave had been bequeathed to a new master and died, that such master should ever afterwards pay taxes in respect to such slave, because he was once the owner. All the rights of property and interest in the slave passed to the freeman, created by the be-

quest, and, by operation of law, were merged in him, and, as property, neither in fiction or fact, had afterwards any existence.

The conditions attached to the bequest of freedom in the will, under consideration, are manifestly conditions subsequent, and being subsequent, they are wholly unauthorised by the act of Assembly, and are therefore void. The power of testamentary manumission only exists in *Maryland*, in virtue of the 13th section of the act of 1796, ch. 67, and it can only be exercised in pursuance of the authority thereby given. A testator, under this enactment, is explicitly empowered to limit or prescribe the period at which manumission shall commence or take effect, but there his power ceases. Freedom having once commenced, the act of Assembly confers no power to the testator, and he possesses none without it, to put an end to a state of freedom, and restore the condition of slavery. "Once free and always free," is the maxim of *Maryland* law upon the subject. Freedom having once vested, by no compact between the master and liberated slave, nor by any condition subsequent, attached by the master to the gift of freedom, can a state of slavery be reproduced. Nothing short of legislative power, duly exercised, can produce such a result; can convert a freeman into a slave.

By terms the most unequivocal in the will before us, the petitioner was to "be free at the age of thirty-eight years." That such was the intention of the testator, is demonstrated by the conditions attached to the bequest, as the performance of the conditions could not be legitimately affected, but by the assumption of the previous freedom of the petitioner.

JUDGMENT AFFIRMED.

Negro Andrew Franklin *vs.* Freeborn G. Waters, Exc'r of Charles Waters.—*December*, 1849.

A negro slave was manumitted, by deed, on the 1st of January, 1840, but was held in servitude, by his master, until the 12th of May, 1846. Held: that he could not maintain an action against his master, to recover the value of his services for the time he was so held to service.

The case of *Queen vs. Ashton*, 3 *H. & McH.*, 439, explained and approved.

In this State, where we have a separate chancery jurisdiction, the question of fraud, as a means of preventing the effect and operation of the statute of limitations, must be referred to chancery, and cannot be relied on, by way of replication to the plea of the statute, in a court of law.

Appeal from *Baltimore* county court.

This was an action of *assumpsit*, instituted, on the 2nd of September, 1846, by the appellant, a negro, against the appellee, to recover the value of his services during the time he was held in service by the appellee's testator, from the 1st of January, 1845, until 1st of May, 1846.

The declaration contains the general *indebitatus assumpsit* and money counts, also a count upon an account stated. The defendant pleaded, 1st, *non assumpsit*, 2nd, *non assumpsit infra tres annos*, and 3rd, *actio non accrevit infra tres annos*.

The plaintiff took issue upon the first plea, and traversed so much of the *second* as relates to the sum of $400, due for the services of the plaintiff, performed within three years next before the commencement of the suit, and as to the residue of said plea, by way of replication, alleged, "that for a long period of time before the institution of this suit, until within three years thereof, the plaintiff was illegally imprisoned and held in duress by the defendant's testator, and was never, until within three years before the commencement of this suit, at large and free from such duress and imprisonment, and this he is ready to verify," &c.

The plaintiff also traversed so much of the *third* plea as related to the value of his services within three years next before institution of the suit, and as to the residue, by way of replication, alleged, "that the plaintiff was, on the 9th of June,

1812, a slave for life to said *Charles Waters*, who then executed a deed of manumission, which was recorded according to law, and which released the plaintiff from slavery from and after the 1st of January, 1840, by force of which the plaintiff became entitled to his freedom from and after said last mentioned day; yet the said *Waters*, contriving and intending to deceive and defraud the plaintiff of the value of his services, fraudulently concealed from him the execution of said deed, and fraudulently pretended that the plaintiff was his slave for life, and actually continued to hold the plaintiff as his slave, from and after said 1st of January, 1840, until the 12th of May, 1846. By reason of which said fraudulent contrivance, concealment, actings and doings of the said *Waters*, the said plaintiff was kept in ignorance of his said several causes of action from the time they accrued, until within three years next before the commencement of this suit, and this he is ready to verify," &c.

The defendant rejoined, and took issue upon the traverses tendered in the replication, and traversed the residue thereof, and, upon the traverses tendered by the rejoinder the plaintiff took issue.

At the trial, the plaintiff offered in evidence a deed of manumission executed by the defendant's testator, on the 9th of June, 1812, by which, said testator "manumitted and set free my negro boy, *Andrew*, from and after the 1st day of January, 1840," and then offered evidence, by competent witnesses, tending to prove that he was the same person named in said deed of manumission, the value of his services, and that he was detained in slavery by said testator up to the time of the latter's death, on the 12th of May, 1846, and was kept in ignorance of said deed of manumission, and of his right to freedom, until he was discharged by the defendant, as executor as aforesaid, on the 2nd of September, 1846.

The defendant, then, in order to show that the plaintiff was not the person named *Andrew* in the deed of manumission, offered in evidence the will of his testator, executed on the 2nd of April, 1846, in which the testator bequeaths a legacy of

$100 to his "negro man *Andrew*," and a receipt to defendant, as executor, for this legacy, executed by the plaintiff on the 11th of December, 1846.

The plaintiff then prayed the court to direct the jury:

1st. That if they find that the plaintiff is the person named *Andrew* in the deed of manumission of the 9th June, 1812, and that he was retained in the service of defendant's testator in the manner stated in his evidence, then the plaintiff is entitled to recover so much as the jury may find, from the evidence, his services were worth from the period for which they may find he was so retained by the testator, after the 1st day of January, 1840.

2nd. That if they further find, that the testator fraudulently concealed from the plaintiff the execution of said deed, and that plaintiff was ignorant thereof, and remained with the testator, under the impression that he was the slave of the testator, who claimed him as such until his death, then the plaintiff is entitled to recover, as in 1st prayer.

The defendant then offered this prayer:

That if the jury find, from the evidence, that the plaintiff was claimed by the defendant's testator, in his lifetime, as a slave, and held and used by him as a slave, in his lifetime, and down to the period of his death, the plaintiff will not be entitled to recover in this action, for his services rendered to the said defendant's testator, whilst he was so held in servitude, as a slave.

The court (Le Grand, J.,) rejected the prayers of the plaintiff, and granted that of the defendant; to the granting of which, and the refusal to grant his own, the plaintiff excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before Dorsey, C. J., Chambers, Spence, Martin, and Frick, J.

May and Dulaney, for the appellant, insisted:

That the suit could be maintained, and in support of this

proposition, cited the following authorities: 2 *Greenleaf on Ev., sec.* 120. 11 *Mass.*, 34. 3 *John.*, 201. 15 *Pick.*, 129, *Guild vs. Guild.* 6 *G. & J.*, 58. 11 *G. & J.*, 256. 3 *Gill*, 239, *McKee vs. Baden.* 1 *Har. & John.*, 341, *Jennings vs. Higgins.* 3 *M. & Sel.*, 191, *Foster vs. Stewart.* 12 *John.*, 188, *Cook vs. Husted.* 3 *Yeates*, 250, *Negro Peter vs. Steel.* 2 *Gilman*, 1, *Jarrott vs. Jarrott.* 2 *Scammon*, 232, *Kinney vs. Cook.* *I Bibb*, 224, *Thompson vs. Wilmot.*

They also insisted, on the 2nd point, that the appellant was imprisoned, or under duress, and that this constituted a good defence to the plea of limitations. *Act of* 1715, *ch.* 23, *sec.* 3. 3 *Black. Com.*, 127. 4 *Yerger*, 299, *Matilda vs. Crenshaw. Coke Litt., sec.* 419.

Fraud is a good replication to the plea of limitations. 4 *Bac. Ab.*, 476. 8 *Cranch*, 84, *Richards vs. Md. Ins. Co.* 2 *Doug*, 655, *Bree vs. Holbech.* 5 *Barn. & Cres.*, 149, *Granger vs. George.* 3 *Bligh.*, 2, *Whalley vs. Whalley. Angel on Lim.*, 188. 2 *Greenleaf on Ev., sec.* 448. 3 *Greenleaf's Rep.*, 405, *Bishop vs. Little.* 3 *Mass.*, 201, *Mass. Turnpike vs. Field.* 4 *Mason*, 143, *Sherwood vs. Sutton.* 9 *Pick.*, 212, *Farnham vs. Brooks.* 6 *Pick.*, 276. 4 *Yeates*, 109, *Jones vs. Conoway.* 1 *Watts*, 110, *Rush vs. Barr.* 8 *Watts*, 12, *Harrisburg Bank vs. Forster.* 2 *Haywood*, 129, *Sweat vs. Arrington.* 2 *McCord*, 426, *Harrell vs. Kelly. Hardin*, 258, *Singleton vs. Lewis.* 4 *Bibb*, 318, *Duvall vs. Stafford.* 1 *Dana*, 373, *Frankfort Bank vs. Markley.* 1 *McLean*, 96, *Mitchell vs. Thompson.* 3 *Vermont*, 212. 1 *Edwards*, 343.

Poe and Alexander, for the appellee, argued:

That the action could not be maintained, and cited: *Co. Litt.*, 308, 816, 282, *b*, 379, *a b.* 1 *M. & Sel.*, 394. 8 *Bing*, 542. 3 *Esp.*, 3, *Alfred vs. Marquis of Fitzjames.* 3 *How.*, 248. 3 *Bl. Com.*, 162. 2 *G. & J.*, 343. *Stockett vs. Watkins.* 3 *Taunt.*, 274. 1 *Taunt.*, 112. 3 *M. & Sel.*, 119. 3 *H. & McH.*, 538, *Queen vs. Ashton.* 1 *H. & J.*, 344. 9 *Car. & Pay.*, 87, *Davis vs. Davis.* 2 *Greenleaf on Ev., sec.* 108. 1 *H. & G.*, 153. 2 *H. & G.*, 103. 1 *Saund.*, 264.

Cowp., 371. 12 *John.*, 188. 11 *G. & J.*, 367, *Abell vs. Harris.* 5 *Wend.*, 531. 3 *Penn.* 212.

The cases whether fraud can be replied, to avoid the statute of limitations, decided in this country, may be divided into two classes. 1st. Where there is no court of chancery, it may be replied at law. 2nd. Where there is a court of chancery, it cannot be so replied. In *New York*, *South Carolina*, *North Carolina* and *Virginia*, there are separate courts of equity, and the plea is not received. *Louisiana*, *Maine*, *New Hampshire*, and *Pennsylvania*, receive the plea. *Kentucky* and *Indiana* are exceptions to the rule.

Angel on Lim., 189. 2 *Doug.*, 654. 2 *Story's Eq.*, *sec.* 1521. 1 *Brown's C. C.*, 445. 3 *Peere Wms.*, 143. 2 *Sch. & Lef.*, 634. 5 *John. Ch. Rep.*, 522. 20 *John.*, 48, 271, 277. 17 *Wend.*, 204. 1 *Hill S. C.*, 296. 3 *Murphy*, 115. 4 *Leigh*, 479. 3 *G. & J.*, 160, 390.

CHAMBERS, J., delivered the opinion of this court.

The counsel for the appellant, aware of the unfavorable impression which has been generally entertained by the profession in *Maryland*, in regard to the right of recovery in such a case as this, have combatted its propriety with a zeal and ability which nothing but truth could resist.

It is a mistake, however, to suppose this professional opinion the result only of some vague conception, formed without foundation.

The early case of *Queen and Ashton*, 3 *H. & McH.*, 439, has doubtless been the origin of such an opinion.

That case was argued by distinguished counsel in the late general court, where the most intelligent members of the bar from all the counties were assembled, and the principles on which it was argued and adjudged, were, in all probability, well known at that time in every part of the State. How else is it to be accounted for, that such actions have been unknown from that period, although it is scarcely possible to doubt that occasions for it have frequently occurred?

We have inspected the record in that case, because there is

some obscurity in the report of it, and we have no doubt the general court decided that the action would not lie. The claimant had been turned out of court by the judgment below, from which he appealed. That judgment was the result of a refusal to declare the law as he claimed it. If the general court supposed the law of the case was with the plaintiff, it was an obvious duty to send the case back on a *procedendo*, with directions to the court below to instruct the jury accordingly, which instruction, according to the facts of the case, must have entitled the plaintiff to a verdict and judgment; but, on the contrary, they affirmed the judgment, thereby deciding that the plaintiff was not entitled to the verdict and judgment, and was properly turned out of court. The obscurity of the case arises from the expression of the reporters, "affirmed on both exceptions," an error into which they appear to have been led by looking to the docket, an entry on which seems to have been made erroneously at first, then altered, but not correctly altered at last.

The second exception could not in fact have been before the general court. The act of October, 1778, ch. 21, sec. 14, authorises persons affected by an equal division of the court, to have a bill of exceptions; and in 4 *H. & J.*, 177, *Smith and Gilmor*, this court held, either or both parties might except under that act, but there is nothing in that act to justify a party to complain in the appellate court of an instruction to which he did not except at the trial, nor to prosecute an appeal on an exception taken by the adverse party, who declines pursuing the appeal himself. In the case of *Queen and Ashton*, the plaintiff did not except to the instruction stated to have been given in the second exception, and the defendant, by whom the exception was taken, did not prosecute an appeal, so that the general court was not called to act at all on that exception.

We cannot agree with the appellant's counsel, that the case of *Queen and Ashton*, introduces any new principle. The relations that exist between master and slave, must necessarily modify those general rules which govern the rights of persons. This was fully declared and acted upon in the case of *Alfred*

vs. Marquis of Fitzjames, 3 *Esp.*, 3, decided by *Lord Kenyon* fifty years ago. The plaintiff in that action, which was *assumpsit* for work and labor, was a slave, in *Martinique*, to the defendant's wife before her intermarriage, and came with her to *England*, where he continued to reside with her, and after her marriage, with the marquis; yet the court held, and the reporter says, with emphasis: "*Lord Kenyon* was prepared to give a *decided* opinion, the plaintiff was not entitled to recover, unless it could be proved that the marquis had *expressly promised* to pay wages, and then only from that time. And the ground of this decision was, that there was no original contract for wages, which must mean a contract, express or to be implied." *Lord Kenyon* cannot be supposed to deny, that in a proper state of facts, a jury not only may, but is bound to infer a contract, a position universally admitted, and to prove which, it is only necessary to refer to the numerous cases cited at bar. But it is an equally sound principle, that no such *assumpsit* or contract to pay can be implied, where the facts show that the parties did not intend or design the one to pay or the other to receive. Where, from the fact that both parties understood, no compensation was to be made, or, from any other circumstances, it would be utterly inconsistent with the transaction, the law will not imply a contract to pay. 2 *G. & J.*, 341, *Stockett and Watkins*, and cases there cited.

In *5th Wend.*, 531, the action for work and labor was brought, as here, by a negro man against the person who had held him as a slave, he being in fact free, yet, on the authority of the case of *Alfred and Marquis Fitzjames*, it was held, the understanding of the parties during the service being that no wages were to be paid, the plaintiff could not recover. We have found no case in which, under such circumstances, an action of *assumpsit* has been sustained, in *England* or in any State in this Union, except the one in *Pennsylvania* and those cited from *Illinois*.

In 3 *Yeates*, 250, *Negro Peter vs. Steel*, decided in *Pennsylvania*, in 1801, by *Yeates* and *Brackenridge*, justices of the Supreme Court, such an action was sustained. To that

authority we cannot defer, for several reasons, and, amongst them, because, first, the then chief justice and his immediate predecessor, had each expressed a different opinion in that very case; next, because the later case, in 3 *Pennsylvania Reports*, 212, *Urie and Johnson*, seems virtually to overrule it, and again, because the case of 3 *Esp.*, directly in point, was not before the court or cited in the argument, but, especially, because it was ruled on the ground, that it was a proper form of action in which to try the question of freedom.

In *Kinney and Cook*, 3 *Scammon*, 232, such an action was sustained in *Illinois*. The principal question seems to have been, whether the negro was free because he was a negro? Not a particle of evidence was given to show the plaintiff to be free, nor was a single authority referred to in the cause by the counsel or the court, as far as the report shows; and the learned justice who gave the opinion very civilly decides, that the rule which, in the slave states, imposes the *onus probandi* on the party asserting his freedom, is founded in "injustice," is "subversive of natural right, its arbitrary character is repugnant to moral sense," &c., &c. Notwithstanding these most potent recitals, we must decline allowing *Justice Smith's* repealing act to operate extra-territorially, as far as relates to *Maryland*, where we will, *non obstante*, abide by the old fashioned practice of requiring a party asserting a fact to prove it, when an issue is taken upon it by the adverse party. The other case referred to in *Illinois*, and found in 2 *Gillman*, 1, the case of *Jarrot vs. Jarrot*, was argued and decided, not only with very much better temper, but with very much greater ability and legal learning. The great question in the cause was, whether the plaintiff was free or a slave? There does not appear to have been any question made as to the form of action for which the authority of the previous case was relied on by counsel, and it was doubtless on the question of freedom *vel non* that the court divided.

But besides that, this question was not seriously discussed, it must be remembered, that the reason on which these cases rest is conclusive against their authority in *Maryland*. That

reason is, that it is a proper form in which to try the title of the negro to freedom. Now, in our State, the mode in which this question is to be tried, is not only prescribed by statute, but there are peculiarities in regard to it, which cannot be gratified but by an observance of the mode indicated. It must be by petition in a court particularly designated, and the right of peremptory challenge is expressly secured to both master and slave. To deny to either party the privilege secured by the statute, if the trial be by petition, would be an admitted violation of the plain meaning and express words of the law. Is it less so to permit one of the parties to deprive the other of this privilege, by using a different form of action?

So in some of the slave States, where no special provision exists as to the mode of trying the question of freedom, they use the action of trespass *vi et armis* for that purpose, as is proved by the cases cited by counsel, and in some of which it is said, the freedom should be thus established before they can claim compensation, although that compensation was said to be recoverable afterwards in the same form of action.

The counsel attempted a distinction between cases in which there was ground for reasonable doubt, and where no doubt could exist. In the case of *Alfred and Marquis Fitzjames*, no such distinction was relied on, and certainly there could be as little ground to doubt in that case, where no one *could* be a slave, as in this case, (where the manumission does speak of some conditions,) or indeed in any case which can occur in our State. But the impossibility of practically following out any such rule must be obvious.

Who is to judge whether the case be clear or one of doubt? When is it to be ascertained, and how? Is the form of action only to be ascertained by the result of the trial? The parties will certainly differ. It is of frequent occurrence that juries are unable to agree upon questions of fact, and judges are not always unanimous in regard to questions of law. The only persons at all likely to be held and claimed as slaves in this State, are such as have been manumitted by last will and tes-

tament, or a deed recorded, and whose freedom is to commence at some date subsequent to the execution of the will or deed.

But as all such instruments are exposed on the public records, to which all persons have ready access, and of which any one is able to procure copies, there is very small probability in this age of benevolence and charity, that there will be wanting persons to remind them of their rights, should they be otherwise uninformed. Experience has fully demonstrated, that they have never failed in the recovery of their legal rights, for the want of generous professional aid. We do not therefore admit the necessity, if, on other accounts, we could perceive the propriety or claim the authority of changing the recognised principles of common law applicable to this question, especially as our statute law enforces the necessity of adhering to it.

This decision on the principal question would conclude the whole case, and, especially, so much as relates to the fact of imprisonment, alleged to be implied by holding and claiming the appellant as a slave.

The remaining question in the cause, though practically unimportant in this case, after the view we have taken, is, however, presented by the record, and has been most elaborately argued by all the counsel, and is one of much interest to the profession.

A most careful and deliberate consideration has therefore been given to the numerous authorities referred to, and without here entering into a detail of reasoning, or a minute examination of their respective claims to deference, it is sufficient to announce the conclusion to which we have been conducted, with the same unanimity with which we have acted on the first point. That conclusion is, that in *Maryland*, where we have a separate and distinct chancery jurisdiction, the question of fraud, as a means of preventing the effect and operation of the statute of limitation, must be referred to that jurisdiction, and is not matter to be relied on, by way of replication to the plea of the statute, in a court of law.

JUDGMENT AFFIRMED.

JONATHAN HUDDLESON *vs.* JAMES REYNOLDS' LESSEE.—*December*, 1849.

A tract of land, whose patent name was "*Western Route*," was described in the sheriff's returns to a writ of *fi. fa.* and *rendi exponas*, and also in the sheriff's deed to the purchaser, as "*West Route*." HELD: that this variance in the spelling of the name, was not a fatal objection to the title of such purchaser.

A mistake in spelling the name of a tract of land, will not vitiate an instrument of writing, if the word mispelt resembles, in sound or sense, the right name.

Where a tract of land is sometimes called by its patent name, and sometimes by another, which it had acquired by reputation, a conveyance by the latter name will pass the title, and any description in the deed of the owner, which is sufficient to pass the title, will be a sufficient description in a sheriff's return and conveyance.

Appeal from *Allegany* county court.

This was an action of *ejectment* instituted by the lessor of the appellee against the appellant, on the 29th of March, 1845, for a tract of land described, in the declaration and patent, as "a tract or parcel of land called '*Western Route*,' lying in the county aforesaid, containing two hundred and eleven and seven-eighths acres." The appellant being the tenant in possession, pleaded *non cul.*

At the trial, the plaintiff, on his part, offered in evidence a patent to *James Reynolds*, his lessor, dated 26th of December, 1836, for the tract of land described as above, and proved that the tract named in the patent, was the land for the recovery of which this suit was brought, and there rested his case. The defendant, then, for the purpose of showing title out of the lessor of the plaintiff, offered the record of a judgment obtained against him, and of the proceedings thereunder, with a view to show a sale, by the sheriff, of the tract of land in controversy. These proceedings show that a judgment in ejectment was recovered against said *Reynolds*, in *Allegany* county court, at October term, 1834, by *William Lamar's* lessee, upon which a *fi. fa.*, for costs, was issued. To this writ *John M. Carleton*,

the sheriff, made return, that in obedience thereto, he had seized and taken in execution the following property of said *Reynolds*, to wit: "Lots Nos. 21 and 22, in *West Union*, and all the improvements thereon, also a tract of land called '*West Route*,' containing two hundred and eleven and three-quarter acres." Which property was appraised, by the appraisers, at $155.50. A writ of *vendi exponas* was then issued, to which the said sheriff made return, that after giving the usual notice of sale, by advertisements, &c., which are particularly described, he sold, on the 26th of November, 1842, the "above described property to *M. C. Sprigg*," the highest bidder. In all these advertisements, writs and returns, the land is described as "a tract of land called '*West Route*,' containing two hundred and eleven and three-quarter acres."

The defendant then offered the sheriff's deed for said land, executed by him to *Michael C. Sprigg*, the purchaser under whom the defendant claimed. This deed was not inserted in the record. In connection with this evidence of title, the defendant offered the act of 1845, ch. 244, entitled, "An act to make valid a sheriff's sale made by *John M. Carleton*, late sheriff of *Allegany* county, and the deed of the said sheriff for the property sold to *M. C. Sprigg*, late of said county, deceased," as follows, passed 5th of March, 1846:

"*Be it enacted by the General Assembly of Maryland*, That the sale made on the 26th day of November, 1842, by *John M. Carleton*, late sheriff of *Allegany* county, to *M. C. Sprigg*, late of said county, deceased, of lots numbered twenty-one and twenty-two, lying and being in *West Union*, in said county, and also of a tract of land called '*Western Route*,' containing two hundred and eleven and seven-eighths acres, sold by the name of '*West Route*,' be and the same is hereby confirmed and made valid, any informality or defects in the *fieri facias* and *venditioni exponas*, under which the said lots and tracts of land were sold by the said *John M. Carleton*, or the sale of the said tract by the name of '*West Route*,' to the contrary, notwithstanding; *provided* that nothing herein contained shall be so construed as to affect the rights of third parties to said pro-

perty; *and provided also*, that said sale has been made, in other respects, conformable to law."

The plaintiff objected to the evidence so offered by the defendant, and prayed the court to instruct the jury, that the title papers so offered, do not show that there was any valid seizure of, or levy upon the tract of land in controversy by the sheriff; and that the sale made by him to the said *Sprigg*, consequently conveyed no title, but was inoperative and void; and that the act of Assembly offered in evidence, did not cure any defect in the defendant's title, arising from the want of a proper seizure of, and levy upon said land; which instruction the court, (MARTIN, C. J.,) granted, and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER, and FRICK, J.

By McKAIG, for the appellant, and
By McLEAN, for the appellee.

MAGRUDER, J., delivered the opinion of this court.

It appears, by the record, that this action was brought to recover a tract of land situate in *Allegany* county, called "*Western Route.*"

In proof of his title, the appellee offered in evidence a patent for that tract of land granted to himself. Thereupon, the defendant, to prove title out of the plaintiff, offered in evidence a judgment against the plaintiff, a *fi. fa.* issued upon that judgment, the sheriff's return, with a schedule and appraisement, showing that he had, in obedience to the writ, seized and taken, together with other land, a tract of land called "*West Route*," and that the same was sold to *M. C. Sprigg*. It is then stated, in the bill of exceptions, that the sheriff's deed was offered in evidence, though it is not in the record.

It is supposed that the mistake which is supposed to vitiate this sale, consists in naming the tract of land "*West Route.*"

when its patent name is "*Western Route.*" Is such a variance a fatal objection to the title of the purchaser?

We think not. A mistake in spelling the name of a tract of land, does not vitiate an instrument of writing, if the word mispelt resembles, in sound or sense, the right name. We are told, that if, in writing "*understood,*" the letter "*s*" is omitted, that does not vitiate the writing, because the meaning cannot be mistaken. In 1770, *Redding's lessee vs. McCubbin*, 1 *H. & McH.*, 368, it was decided, in the provincial court, "that unless the variance between the description of the land in the declaration and the title paper, be material, it will not hinder the plaintiff's recovery." And so, in *Carroll's lessee vs. Norwood*, 4 *H. & McH.*, 287, it was decided, by the Court of Appeals, "that between '*enlargement*' and '*the enlargement,*' there was not such a difference that the plaintiff could not sue by the one name, and recover upon proof of title to a tract of land called, in the patent, by the other.

It is sometimes said, that it was so decided in those cases, because there were plots in them, and the plaintiffs located their lands by their patent names. This cannot be. If the plaintiff can, in his declaration claim one tract, and locate what is to be considered a different tract, and then obtain a verdict, because of a proof of title to the latter, how is the judgment to be rendered upon such a verdict? The judgment for the plaintiff, in all actions of ejectment, is, "that the said lessee, as aforesaid, recover against the said ——— *his term aforesaid*, yet to come and unexpired, in and unto all that tract of land called ———," &c. Now if the land located, and that claimed in the declaration, be different tracts, what term has the plaintiff in the former, or when did the defendant admit lease, entry and ouster to that tract?

It can scarcely be maintained, that there is, between "*Western Route*" and "*West Route,*" a more material variance that between "*enlargement*" and "*the enlargement.*" Is the variance here a substantial variance? Can a route be a western, but not a west route? Is not the sense precisely the same, although there be some difference in the spelling? If,

for mistakes like this, sheriff's sales are to be set aside, a purchaser would not be safe in buying at such a sale, unless he had an opportunity of reading the patent.

The facts disclosed in this case, leave but little doubt that the land claimed in this suit, is the very land which the sheriff undertook to sell. No tract patented by the name of "*West Route*," is shown ever to have been owned by the plaintiff, or to have existence. The conclusion seems to be warranted, that the tract which, when taken up, was called by the name of "*Western Route*," was, in a later time, sometimes called west, and sometimes western route. If so, a conveyance by the name which it had acquired by reputation, would have passed the title to the patented tract, and any description in the deed by the owner, which is sufficient to pass the title, ought to be a sufficient description thereof in a sheriff's return and conveyance.

It might have been left to the jury to say whether the land seized and sold by the sheriff, was not the same land for which the plaintiff produced a patent.

This being the opinion of a majority of the court, it is unnecessary for them to say anything of the act of Assembly of 1845, ch. 244.

JUDGMENT REVERSED, AND
PROCEDENDO AWARDED.

DORSEY, C. J., agreed with the court as to its judgment, but not for the reasons assigned in this opinion. He considered the act of 1845, ch. 244, constitutional.

James Owings *vs.* William Baldwin and George Wheeler.—*December*, 1849.

B and *W* made a parol contract with *O*, for the purchase of certain lands, upon certain terms; upon the compliance with which, on the part of the vendees, the vendor was to give a sufficient deed for the property. Held: that under this contract, the vendees had a right to demand, and were bound to accept nothing short of an unincumbered legal estate, in fee.

If the contract is general, it amounts to an undertaking for the conveyance of a legal title, and if the vendor has but an equitable title, the contract is not binding upon the vendee, at law nor in equity, if the vendor cannot procure the legal title.

A specific performance of a contract for the sale of lands, will not be decreed on the application of the vendor, unless his ability to make such a title as he has agreed to make, be unquestionable.

Part of the land sold under the above contract, was conveyed, in 1799, to *O* and *P*, as joint tenants, in fee. In April, 1818, *P* sold his interest therein to *O*, to whom he gave a paper, signed by himself, and attested by two witnesses, stating that he agreed to take $5,000 for his interest in said property, "which is now bound by a judgment held by *O*, and under execution for the same." The witnesses to this paper prove, that it was agreed between *O* and *P* to credit the $5,000 on the judgment held by *O*, which was then done in *P*'s presence. Possession was shortly afterwards delivered to *O*, who, with those claiming under him, has held uninterrupted and undisputed possession of the property until 1845, the date of the sale to appellees. *P* survived *O*, and died in 1826, never having executed a deed for the property to the latter, who died in 1819. In May, 1818, *O* sold the property to *B*, and executed a bond of conveyance, but no deed therefor. *B* took and remained in possession until 1830, when the executors of *O*, having recovered judgment against *B*, for the balance of the purchase money due by him, issued executions, under which the property was sold and conveyed by the sheriff to the appellant, who, in 1846, contracted to sell it to the appellees. Held:

That this title of the appellant, thus offered, was not sufficient to authorise a court of equity to decree a specific performance of the contract made with the appellees, and compel them to accept the title of the vendor in this condition.

The title of the appellant depending, in a great measure, upon the individual knowledge of the attesting witnesses to this paper, one of whom is already dead, and the duration of this proof being precarious, and the appellant having filed a bill against the heirs of *P*, to perfect his title at law, which bill he dismissed, and the records of the court showing no entry of the suit on the judgments against *P*, a court of equity, having a due regard

[illegible] vs

to the claims which might arise from the heirs of *P*, upon the death of the remaining attesting witnesses, would not compel the appellees to accept this title.

B filed a bill claiming the land, under his contract of May, 1818, and impeaching the validity of the sale by the sheriff. The answers to this bill swore away all its equity, and were supported by proof. HELD: that the pendency of this suit, under such circumstances, was not a sufficient ground for a court of equity to refuse to compel the appellants to execute their contract.

The mere commencement of a suit for the recovery of the whole or a part of the land sold, after the filing of a bill for the specific execution of the contract of sale, is not, of itself, sufficient to prevent the vendee's being decreed to accept the title, provided it appears, to the satisfaction of the court, that the suit so commenced cannot be successfully prosecuted.

The appellant having purchased, at sheriff's sale, the interest of *B*, under his bond of conveyance, which was a mere equitable title, subject to a lien for the balance of the purchase money due by *B*, and this being the only title he professed to have, the appellees were not bound to accept it.

Where the statute of frauds is relied on in the answer, as a bar to a specific execution of a parol contract, it can only be evaded by full proof of the acts of part performance charged in the bill.

Where possession of lands was delivered, not under the contract sought to be enforced, but another subsidiary agreement, the original contract still remaining unrescinded, it will not remove the bar of the statute.

Appeal from the *Court of Chancery*.

The bill in this case was filed on the 20th of May, 1846, by the appellant, against the appellees, for a specific execution of a parol agreement for the purchase of a parcel of land, with the improvements thereon, consisting in part of a factory called *Guilford* factory, which, the bill alleges, the appellees agreed verbally to purchase of the complainant, some time in the spring of 1845, for the sum of $20,000, of which $5,000 was to be paid on delivery of possession, and, within twelve months thereafter, the sum of $1,666.66⅔, with interest on the unpaid balance, and the residue in three equal instalments, in five, ten, and fifteen years, with the privilege to the purchasers of paying the purchase money within the times before limited; possession to be delivered on the 1st of June, 1845.

The bill states, that no agreement note or memorandum of agreement for said purchase, in writing, was ever signed by the

defendants, or either of them, or their agent, and delivered to the complainant, but that, pending negotiations for the purchase, the complainant reduced to writing the terms on which he would sell, which terms were exhibited to and accepted by defendants, and this memorandum is filed as an exhibit with the bill. That on the 1st of June, 1845, complainant delivered, and defendants received, full possession of the premises, according to the form and effect of said agreement, and thenceforth continually have been, and now are, in the free and undisturbed possession and enjoyment thereof. The bill then charges that defendants have wholly neglected and refused to comply with this contract, sometimes pretending that they desired time and opportunity to examine complainant's title to the premises; all the particulars of which, he avers he has been at all times willing to communicate freely, and has submitted his title to the counsel of the defendants, and has paid said counsel for procuring a deed to cure the only defect said counsel supposed to exist in said title, and independent of the usual evidences of title, complainant avers he may well rely on the possession, continued and undisturbed, and adverse against all the world, which he, and those under whom he claims, have had of said premises, for more than twenty years next preceding the delivery of possession thereof, as aforesaid, so that all such pretences of the defendants are wholly groundless. The prayer is, that said agreement may be decreed to be specifically executed, and for general relief.

Exhibit A, filed with the bill, and admitted by the answer, is as follows:

"The property which I offer for sale, is my factory, known by the name of *Guilford*, with all the machinery now in the same, and all my lands adjoining, which I purchased, at sale, from *Richard Iglehart*, late sheriff of *Anne Arundel* county, with all the buildings and improvements on the same, reserving all the granite that has been gotten out by stone cutters, which they must have the privilege of removing as soon as they can make it convenient to do so, not more than three months. I also reserve, for the use of *Mr. Woods*, the house and garden

he now occupies, till the 1st of July next. Should the property be sold, the goods in the store to be taken by the purchaser at prices to be agreed on. Possession to be given on 1st of June next. The price is $20,000, one-third cash; say cash on delivery of possession, $5,000, and within twelve months, $1,666⅔, with interest on the unpaid balance, $13,333.68, to be in equal payments of one-third each, five, ten, and fifteen years. Interest on the unpaid balance to be paid yearly; the property to be kept insured to amount of $10,000, on account of said *Owings*, till it may be paid for. The purchaser to have the privilege of paying within the time named. When the whole of the money is paid, *J. O.* agrees to give a sufficient deed for the same. The crops growing on the land, subject to the contract made by *H. H. Owings*, with the tillers of the land for the present year."

On the 4th of June, 1846, the complainant filed a petition, stating that he had been informed that defendants were taking steps to suspend the operations of the factory, and had resolved to abandon, entirely, the said premises, and praying that a receiver might be appointed to take charge of the same, and rent it out for some short time, on such terms as he may deem expedient; and, by an agreement of the parties, the chancellor, on the 29th of June, 1846, appointed a receiver, as prayed, without prejudice to any question of right.

The answer of the defendants, *Baldwin* and *Wheeler*, requires the production of deeds, and full proof of the title of the complainant in the lands in controversy. It admits, that in the spring of 1845, defendants, being desirous of purchasing the said factory and lands adjoining, of which complainant claimed to be the owner, entered into negotiation with him for that purpose, in the course of which he handed to respondents the paper as above set forth, as an offer of the terms on which complainant was willing to sell said property; which paper respondents received, that they might consider and deliberate on the offer therein contained. They deny that they received or accepted it as a memorandum or evidence of any contract or agreement whatsoever, which they absolutely deny having

made. That the terms contained in said paper being in several respects objectionable, they, in their turn, prepared a paper which they exhibit, and which they allege they presented to the complainant as the only form in which they would agree to consider the offer of the complainant, and on which they would agree to contract for the property, when they should be satisfied in regard to the title. That the complainant, upon seeing this paper, agreed that defendants should retain it, and consider it as his offer to them. That after this, and before any agreement had been made, and before they took possession of the property, they were willing to accede to said offer, and make the cash payment, and comply with the other stipulations in the last mentioned offer, when and so soon as they should be satisfied of the title of the complainant; but they explicitly deny that they then were, or have since been, satisfied with the title, or that, at any time, they have made an agreement, verbally or in writing, for the purchase of the property. The answer then proceeds to state, that upon an examination of the complainant's title, it was found to be defective; but, that being desirous to commence operations, they requested their counsel to see complainant, and make with him some temporary arrangements for the possession of the factory, whilst the objections to the title were examined, and, if possible, removed. That this was done, and the consent of the complainant obtained, that defendants might take possession and hold the same until the title could be investigated, and that for the use and occupation of the property, the defendants were to be chargeable only with the interest on the sum of $15,000, the amount of the deferred payments. That they accordingly took possession on the 2nd of June, 1845, not as purchasers or in part performance of any contract of purchase made or agreed upon, as charged in the bill.

The answer then proceeds to specify the defects in the title:

1st. That the deed of *Richard Odle* to *Richard Owings* and *Isaac Paul*, referred to in the bill, but not produced, granted the lands thereby conveyed to said *Owings* and *Paul*, as tenants in common, and said *Paul* having died many years since,

leaving infant heirs, some of whom are married women, and non-residents, defendants required some sufficient evidence that the title vested in said *Paul*, by said deed, had passed to complainant; that a deed was accordingly prepared to be executed by the heirs of said *Paul*, relinquishing all their claim and title to said property, which deed said heirs, or some of them, refused to execute; that complainant then filed a bill in chancery, to compel a conveyance from said heirs, which is still pending and undetermined; that as to the twenty years' adverse possession set up in the bill, they know nothing, except by hearsay, and required proof of such possession, as would bar the said *Paul* and his heirs, and of the origin and circumstances of any possession adverse to said *Paul* and his heirs.

2nd. That many years ago, a certain *Zachariah Poulton*, who is still alive, was put in possession of said property under some contract with said *Richard Owings*, and he now sets up some claim or right to said property, and threatens to file, or has filed, a bill in equity against said complainant, to enforce his supposed rights, and respondents required full and satisfactory explanation and denial of this claim.

The answer then further states, that after considerable delay on the part of complainant, in satisfying defendants, or their counsel, in regard to the title, and after repeated warnings that they could not consent to become purchasers, unless they were satisfied upon the subject, and their objections remaining unremoved, they, on the 1st of June, 1846, abandoned the possession of the property, after previous reasonable notice had been given complainant of their design to do so; and after again, in the most direct terms, denying that defendants took possession in part performance of any agreement or contract of purchase, relies upon the statute of frauds as a defence to the relief prayed by the bill. The answer also urges the alleged defects in complainant's title as cause against a decree for specific performance; and further insists, that though they did hold the possession, and enjoy the use of the property for a year, under the temporary arrangement before mentioned, and that if the complainant is entitled to recover the interest as stipulated from them,

for such occupation and use, he is not so entitled in the present proceedings: *first*, because he makes no such claim in his bill, and *secondly*, because, in respect to any such demand, he has adequate remedy at law.

The paper referred to in this answer, and exhibited with it, is as follows:

"The property which I offer for sale, is my factory, known by name of *Guilford*, with all the machinery now in the same, and all lands adjoining, which I purchased at sale from *Richard Iglehart*, late sheriff of *Anne Arundel* county, with all the buildings and improvements on the same, reserving all the granite that has been gotten out by stone cutters, which they must have the privilege of removing within three months from 1st of June, 1845. I also reserve for the use of *Mr. Woods*, the house and garden tract now occupied, until 1st of July next, should the property be sold.

"Possession to be given on 1st of June next. The price is $20,000, one-third in cash; say in cash, on delivery of possession, 5,000, and within twelve months, $1,666⅔, with interest on the unpaid balance, $13,333.66, to be in equal payments of one-third each, five, ten and fifteen years. Interest on the unpaid to be paid yearly. The property to be kept insured to amount of $8,000, on account of said *Owings*, till it may be paid for. The purchasers to have the privilege of paying up any time within the time named, when whole money is paid.

J. O."

The proceedings in the case of *Poulton vs. Iglehart and Owings*, introduced into the record, show that said *Poulton* filed his bill against *Samuel Owings* and *James Owings*, executors of *Richard Owings*, deceased, and *Richard Iglehart*, Sheriff of *Anne Arundel* county, on the 29th of June, 1847, charging, that in the year 1818, said *Richard Owings*, falsely pretending that he was the owner of the *Guilford* mills, and adjoining lands, induced complainant to purchase them for the sum of $11,200, for which amounts he gave his several promissory notes to said *Owings*, who, at the same time, executed a bond of conveyance (which is exhibited with the bill.) to com-

plainant for said land, upon payment of said notes. That said *Owings* delivered possession of the mill and lands to complainant, who paid to said *Richard Owings*, in his lifetime, and to *James Owings*, one of his executors, since his death, the said notes, as they became due, to the amount of $7,000, but failing to pay two of his notes, the said *James Owings*, executor as aforesaid, with *Richard Iglehart*, sheriff, as aforesaid, about the 9th of July, 1830, took possession of said mill and premises, and wrongfully and fraudulently dispossessed complainant, pretending that the same had been sold to said *James Owings*, under writs of *fi. fa.* upon judgments against complainant, at suit of the executors of said *Richard Owings*. That complainant being, at that time, feeble in body, and weak in mind, and wholly unable to attend to his affairs, quietly suffered this dispossession, and has continued so dispossessed up to the present time. The bill then alleges, that said *James Owings*, finding he had no title to said property, under any proceedings against complainant, filed a bill in chancery against the heirs of said *Isaac Paul*, against whom he alleges he has an equitable claim. The prayer of the bill is, that said executors may be decreed to account with complainant for the rents and profits of the mill and lands since he has been so dispossessed thereof, and if they cannot show a sufficient title in *Richard Owings*, deceased, to execute his bond of conveyance, then that the money complainant has paid on his said purchase, may be refunded to him, and if a sufficient title be hereafter procured, that they may be decreed to convey said property to complainant, in pursuance of said bond of conveyance, and for general relief.

The bond of conveyance from *Richard Owings*, exhibited with this bill, is in the usual form, reciting the purchase by *Poulton*, as charged in the bill, and the execution of the promissory notes, and is dated the 9th of May, 1818.

The answer of *James Owings* to this bill, after admitting the agreement for purchase, and the execution of the bond of conveyance as charged in the bill, avers, that *Richard Owings*, at the time this bond was executed, was in possession of the premises, and entitled thereto, and fully authorised to sell the

same. That said premises, many years before that time, had been owned and possessed by said *Richard Owings* and one *Isaac Paul*, as co-partners, or tenants in common. That said *Richard* afterwards sold all his interest in said premises to said *Paul*, for a large sum of money, to be paid at a then future day. That this purchase money was not paid at the day, and said *Richard* having recovered judgment therefor, against said *Paul*, and having issued and levied his execution on said premises, it was agreed between said parties, that said *Paul* should sell all his interest in the aforesaid premises to said *Owings*, for the sum of $5,000, to be credited on the judgment. That this credit was allowed, and said *Paul* actually surrendered possession of said premises to *Owings*. That this agreement was entered into in the month of April, 1818, and that said *Owings*, and those claiming under him, have ever since held, possessed and enjoyed said premises as their own absolute estate, without any claim, let, or molestation on the part of said *Paul*, or any person claiming under him. That defendant is advised and insists, that after such long and continuous possession of the premises, it will be presumed that the title and interest of said *Paul* therein, were duly conveyed unto said *Richard Owings*, in execution of said agreement.

That full and entire possession of the premises was delivered by the said *Richard Owings* to complainant, shortly after the execution of said bond of conveyance, and the complainant held and enjoyed such possession, quietly, until the year 1830, when he freely and voluntarily surrendered the possession to this defendant, under the following circumstances: Defendant and his co-executor recovered judgment on two of complainant's promissory notes, upon which executions were issued, and placed in the hands of *Richard Iglehart*, sheriff of *Anne Arundel* county, in which said judgments were recovered, who, in virtue thereof, seized said premises and duly sold the same to this defendant, on or about the 9th of June, 1830, for a large sum of money, which defendant has fully paid and satisfied. That complainant was present at said sale, and acquiesced therein, making no objection whatever to the regularity there

of, and shortly thereafter, freely abandoned the possession thereof to defendant, who held the same without objection on the part of complainant, from that time until the year 1846. The answer denies that complainant was feeble in body, or weak in mind, as charged in the bill, and avers that defendant, relying on the title thus acquired, has made large and extensive improvements on said premises, and insists that he is to be treated as a purchaser for a valuable consideration, without notice of complainant's pretended claim. The answer further says, that in the year 1845, defendant agreed to sell said premises to *Baldwin* and *Wheeler*, when it was discovered that no conveyance had passed from said *Paul* to *Richard Owings*, and to obviate this objection, defendant, contrary to the advice of his own counsel, who expressed an opinion, that, under the circumstances, a conveyance from said *Paul* would be presumed, caused a bill to be filed against the heirs at law of said *Paul*, for a conveyance of his interest in said premises; that the effort to obtain this conveyance, being attended with more expense than was at first anticipated, he caused said bill to be dismissed. The defendant further insists, that there is yet due from complainant a large amount on his notes to said *Richard Owings*, which he ought to be required to pay, before obtaining any relief.

The answer of *Samuel Owings*, the other executor, adopts that of his co-defendant, *James*, and that of *Richard Iglehart* simply asserts, that he sold the premises to *James Owings*, as stated in the answer of the latter, and has executed a deed therefor to the purchaser.

The proof taken under the commission, shows: 1st. In reference to the title of *Richard Owings* in the premises in question, a deed from *James Carey*, dated 7th of October, 1799, conveying the *Guilford* mills to said *Richard Owings*, in fee, for the consideration of £1,200. Another from *Richard Odle*, dated 24th of May, 1799, conveying to *Richard Owings* and *Isaac Paul* the adjoining lands, containing one hundred and twenty-seven acres, for the consideration of £300. Also the agreement of *Isaac Paul*, recited in the opinion, dated 20th of

April, 1818, with the testimony of *Samuel Brown, Jr.*, and *Basil Owings*, the attesting witnesses thereto, "that the property in question was about to be sold under execution, at suit of *Richard Owings*, against said *Paul*, when the agreement was made, that *Owings* was to give *Paul* $5,000 for the property, which amount was to be credited upon judgments which *Owings* had against *Paul*. *Brown* was security for *Paul*, and paid the balance due on the judgments, and the $5,000 was credited. Possession was delivered shortly after this agreement. This agreement was to pass all the interest of *Paul* in the premises. 2nd. As to the title of the complainant, *Jas. Owings*, a deed from *Richard Iglehart*, sheriff, dated 3rd of June, 1845, conveying to said *James Owings* the whole property in question, taken in execution and sold under writs of *fi. fa.* issued against *Zachariah Poulton;* and another deed from the same party, dated 17th of March, 1846, executed for the purpose of curing certain defects in the original deed; also proof sustaining the answer of said *James Owings* to the bill of *Poulton*. 3rd. As to the agreement charged in the bill of *Owings*, and the possession of the appellees of the premises, the evidence is sufficiently stated in the opinion of this court.

On the 2nd of March, 1848, the chancellor (Johnson,) passed a decree dismissing the bill, from which the complainant appealed. The opinion of the chancellor, accompanying this decree, is reported in 1*st Md. Ch. Decisions*, 120.

The cause was argued before Dorsey, C. J., Chambers, Spence, Magruder, Martin, and Frick, J.

By Thos. S. Alexander, for the appellant, and
By R. J. Brent and Neilson Poe, for the appellees.

Dorsey, C. J., delivered the opinion of this court.

That an oral contract for the sale and purchase of the lands, mentioned in the proceedings in this cause, existed prior to the 1st day of June, 1845, and that it never has been abandoned or rescinded by the concurrence of both parties, we regard as

fully and satisfactorily established by the proof in the record before us. And it is equally clear, that a compliance with the terms and condition of this contract, did not take place at the time anticipated by the parties, in consequence of the vendee's objections to the sufficiency of the vendors' title; which objections he promised to have removed in a very short time. That both parties being desirous that the property contracted for should not remain unoccupied and unproductive, during the time about to be consumed by the complainant in perfecting his title, the original contract being left unrescinded and unchanged, except as to the time for its consummation, entered into a subsidiary agreement, whereby it was stipulated, that the defendants should take immediate possession of the property purchased and hold it, as the tenant of *James Owings*, at the rate of $900 a year, until the objections to his title could be removed; which removal, it was the anticipation and understanding of the parties, could be effected in a very short time. This condition of the parties, with regard to possession, which commenced on the 1st of June, 1845, is satisfactorily proved by two witnesses, *Gambrill* and *Poe*, who, in our interpretation of the other proof in the cause, wholly stand uncontradicted. Complainant, after spending much more time than was anticipated, in efforts, (partially unavailing,) for the perfection of his title to the satisfaction of the defendants, received notice from them, in February, 1846, that unless a clear title in the complainant were made to appear, they would give up the contract and abandon the possession of the premises, which they accordingly did, about the 1st day of June, 1846. On the 20th of May, 1846, the present bill of complaint was filed against the defendants, to enforce the specific execution of the contract between them, alleging his ability to give a good title to the property purchased. The defendants having denied almost all the allegations in the bill, have pleaded the statute of frauds, and deny their obligation to accept the title which the plaintiff is able to give them. In proof of his ability to execute the requisite conveyance, the plaintiff has shown a title in *Richard Owings* for the *Guilford Mills*, by a deed exe-

cuted by *James Carey*, in 1799; and of his right to the adjoining lands, he exhibits the deed of their former owner, *Richard Odle*, to *Richard Owings* and *Isaac Paul*, as joint tenants in fee, dated in May, 1799. It appears by the proof in the cause, that the property mentioned in both those deeds was, before the year 1813, held, and the mill carried on for the benefit of *Richard Owings* and *Isaac Paul*, in the name of "*Owings and Paul*." That in or about the year 1813, *Richard Owings* sold out all his interest in the property to *Isaac Paul*, who thenceforth held and carried on the same, in his own name, until the 20th of April 1818, when *Isaac Paul* sold out all his interest in the premises to *Richard Owings*, and gave to him a paper, signed by *Paul* and attested by two witnesses, stating, that *Paul* had on that day agreed to take $5,000 for his right and interest in the *Guilford Mills* and the adjoining land, "which is now bound by a judgment held by *Mr. Richard Owings*, and under execution for the same." And it was also proved by the said subscribing witnesses, that it was the agreement between the said *Richard Owings* and *Isaac Paul*, that the $5,000 were to be credited on the judgments which *Richard Owings* had against *Isaac Paul;* which credit was then given in *Paul's* presence, and *Samuel Brown, Jr.*, one of the subscribing witnesses, who was the security of *Paul*, paid to *Richard Owings* the balance due on the judgment. In consequence of this sale, *Paul*, in less than a month afterwards, delivered the possession of the property to *Richard Owings*, who, with those claiming under him, have ever since been in the possession and enjoyment thereof. It does not appear that *Richard Owings* ever executed a deed to *Paul*, or *Paul* to *Richard Owings*. *Richard Owings* died about the year 1819, and *Paul* about the year 1826.

Assuming, then, that the complainant held all the title which *Richard Owings* would possess, had he lived till the present day, and continued in the uninterrupted possession and enjoyment of the *Guilford Mills* and the adjoining lands, has the plaintiff such a title as the defendants are bound to accept under the contract in this case, is the first question which presents

itself for our determination? Had the adjoining lands, the one hundred and twenty-seven acres, which were conveyed by *Richard Odle* to *Richard Owings* and *Isaac Paul*, been conveyed to *Richard Owings* only, as the *Guilford Mills* had been by *Carey*, this question ought to be answered in the affirmative. Because no belief can, rationally, be entertained for a moment, that a court of equity, under any aspect in which the fact and circumstances of the case could be brought before it, could sanction the claim of the heirs of *Isaac Paul* in attempting to assert an equitable title to the property in controversy. In respect to their claim of legal title, it could not be pretended that they had any.

But the deed from *Odle* did not transfer the one hundred and twenty-seven acres of land adjoining the *Guilford Mills* to *Richard Owings* only, but to *Richard Owings* and *Isaac Paul*, as joint tenants in fee; and *Paul*, by right of survivorship, became, at law, the sole owner in fee of the land covered by the deed from *Odle*, and, at law, so continued, notwithstanding the unregistered contracts which had, from time to time, been entered into between him and *Richard Owings*. It is apparent, therefore, that *James Owings*, apart from the title claimed by him from long continued possession and the statute of limitations, has, at law, in the adjoining lands, no title. Under the contract with *James Owings*, the defendants, upon performance on their part, had a right to demand, and were not bound to accept any thing short of an unincumbered legal estate in fee. If authorities be requisite for such a proposition, they may be found in 2 *Sug. Vend.*, 139, where it is said, "if the contract is general, it amounts to an undertaking for the conveyance of a legal estate; and if the seller have no more than an equitable one, the contract is not binding upon the purchaser at law, nor, as we have seen, in equity, if the seller cannot procure the legal title:" and in the opinion of *Chief Justice Marshall*, in *Garnett, &c., vs. Mason, et al.*, 1 *Call*, 368, who says: "Both on principle and authority, I think it very clear, that a specific performance will not be decreed on the application of the vendor, unless his ability to make such

a title, as he has agreed to make, be unquestionable." "He had a right to expect an unincumbered estate in fee-simple would be conveyed to him." The proviso in the quotation from *Sug. Vend.*, "if the seller cannot procure the legal title," can be of no avail to the plaintiff. The case before us, is not that of a vendee going into a court of equity to be discharged from the obligation of performing his contract, on the ground that the vendor has but an equitable title, where the court will withhold the relief sought, until the vendor has an opportunity of proceeding in chancery to convert his equitable into a legal title. But it is the case of a vendor, who, (as is assumed,) has gone into equity, to render his title perfect at law, has failed to do so, and dismissed his proceedings for that purpose, and turns round and files his bill in chancery to coerce the specific performance of his contract, and to compel the vendees to accept his title in its then condition.

In behalf of the plaintiff it is alleged, that the possession held by him and those under whom he claims, since the contract, in April 1818, between *Richard Owings* and *Isaac Paul*, vests in the plaintiff a clear and unquestionable legal title, which the defendants are bound to accept. In 1 *Hopkins Ch. R.*, 436, *Seymour vs. De Lancey, et al.*, on a bill filed for the specific performance of a contract for the sale of land, it was held, that a "title by adverse possession for twenty-five years would be sufficient, if established, to preclude all other questions." In 2 *Sug. Vend.*, 125, we find it stated, that "in a case where a close called the '*Croyle*,' had always been known by that name, and had been possessed by the seller and his ancestors as part of the estate sold, but no mention was made of it in the deeds by name, and all the other lands were particularly described, the court considered the evidence of title to be merely that of long possession, and held that the purchaser was not bound to accept the title." And the case of *Barnwall vs. Harris*, 1 *Taunt.*, 430, sustains the principle, that a purchaser is not bound to accept a title, dependent for its establishment on oral testimony, resting in the peculiar knowledge of a single witness. Without attempting to recon-

cile these authorities, apparently somewhat in conflict; or contending, that no case can arise in which a vendee would be required to accept a vendor's title, resting entirely for its sustentation on his adverse, uninterrupted and notorious possession for upwards of twenty years, this court will content itself in saying, that the plaintiff in this cause has not shewn himself so entitled to the lands sold, as to authorise a court of equity to decree the specific performance of the contract, and to coerce the defendants to accept the title of the vendor in the condition in which it is offered.

The facts upon which the appellant asserts the sufficiency of his legal title, are the following paper, and the evidence of the subscribing witnesses thereto, and the evidence of subsequent continuous possession. The paper is in the following terms:

"*April 20th*, 1818.

I this day have agreed to take $5,000 for my right and interest for *Guilford Mills*, which is now bound by a judgment held by *Mr. Richard Owings*, and under execution for the same, and all the equitable right, title and interest I have in the land adjoining, which shall be clear of dower.

ISAAC PAUL."

"*Samuel Brown, Jr., Basil Owings.*"

This paper of itself, if capable of perpetual preservation, cannot be regarded, either at law or in equity, as transferring any title to the property mentioned therein to *Richard Owings* or any body else; it is nothing more than the written declaration of *Isaac Paul*, that he had on that day agreed to take for it the sum of money he named. But that *Richard Owings*, or any other person, was in treaty for its purchase, or had agreed to become its purchaser, is a fact of which the paper, *per se*, furnishes no evidence. The paper alone, as a contract, has no operation, and its character, as such, is only shewn by the testimony of the two subscribing witnesses, who proved that it was intended as an agreement of sale between *Isaac Paul* and *Richard Owings;* and that the $5,000 were to be credited on judgments of *Richard Owings* against *Isaac Paul*,

under which the property was taken in execution and about to be sold; that the credit was forthwith given accordingly, and the possession of the property, with the key of the mills, was delivered to *Richard Owings* by *Paul*, before the 9th of May, 1818. That *Richard Owings*, and those claiming under him, had ever since been in possession, was proved as well by the attesting as other witnesses. Upon this statement of facts, it is contended on the part of the plaintiff, that under the aforegoing agreement, from the time of the delivery of possession by *Paul*, in May, 1818, till the month of June, 1845, the possession of the plaintiff, and those under whom he claims, was known to *Paul*, was held adversely, and must be deemed sufficient evidence to prevent the successful prosecution of any proceedings, either at law or in equity, which those claiming under *Isaac Paul* might hereafter institute for the recovery of the property in question, or any portion of it. If all the facts detailed in the testimony of the subscribing witnesses, in relation to the agreement of April, 1818, between *Paul* and *Richard Owings*, were, like the possession, matters of notoriety, resting in the knowledge of the neighborhood in which they transpired, so as to be readily susceptible of proof, in the event of future litigation between the heirs of *Paul* and these defendants, the present appeal, to the discretion of the court of chancery, would be far stronger than it is in the attitude in which it is now presented. But such is not the character of the testimony now relied on. The material and most important facts to which the subscribing witnesses have testified, and which are mainly relied on by the plaintiff, appear to rest exclusively in their individual knowledge. With their decease, (and one of them it is said no longer exists,) all means of establishing the important facts to which they deposed are lost. Looking to the precarious duration of the proof on which the title of the plaintiff depends, to the fact that he filed a bill in chancery against the heirs of *Paul*, to procure from them a conveyance by which his title at law was to be perfected, and afterwards dismissed it; and to the additional fact, that on the records of the court in which the judgments against *Paul* were rendered,

no entry of the credit of $5,000 has been made, could a court of equity, having a due regard to the claims that might arise from the heirs of *Paul*, upon the death of the remaining attesting witness, compel the defendants to accept a title, the continuance of which is so contingent and uncertain? We think not.

It has been insisted by the defendants, that they cannot be required to receive the title proffered them by the plaintiff, because there is a suit now pending against him in the court of chancery, (commenced since the bill now before us was filed,) by one *Zachariah Poulton*, for the recovery of the property, the subject of controversy in this case, in which he alleged, that on the 9th of May, 1818, he purchased the same of *Richard Owings*, and gave his eleven promissory notes, each for the sum of $1,000, was immediately put into possession thereof by *Richard Owings*, who gave a bond of conveyance therefor; and that he continued in the full possession and enjoyment of his purchase until the year 1830, when he was wrongfully dispossessed, by a fraudulent combination between the plaintiff and *Richard Iglehart*, the sheriff of *Anne Arundel* county, they pretending that there had been a sale of the property to the plaintiff, under one or more writs of *fieri facias*, upon judgments against *Poulton*, at the suit of *Samuel* and *James Owings*, executors of *Richard Owings*. The answer of *James Owings* swore away all the equity of the bill, and the answer is abundantly sustained by the testimony before us. In addition to the exhibition of the sheriff's deed, the judgments and executions under which the property was sold, the oral testimony most satisfactorily shews, that the property was sold by the sheriff, at a *bona fide*, public and fair sale, at which *Poulton* was present, made no objection to it, and soon after, voluntarily, gave full possession to *James Owings*, which he and those claiming under him, have ever since uninterruptedly held. The question thence arises, is the pendency of this suit, under such circumstances, a sufficient ground for the refusal of a court of equity to compel the defendants to execute their contract? We do not so regard it. If it were so, it would estab-

lish a most unjust and inconvenient principle, by which an unscrupulous vendee might always evade the performance of his contract, by inducing a factitious claimant to institute proceedings against the vendor, at law or in equity, for the recovery of the property sold, or to establish some pretended lien upon it, after the vendor had filed his bill for the specific execution of the contract. That the mere commencement of a suit, for the recovery of the whole or a part of the land sold, after the filing of a bill for the specific execution of the contract of sale, is not, of itself, sufficient to prevent the vendees being decreed to accept the title; provided it appears to the satisfaction of the court, that the suit so commenced cannot be successfully prosecuted. See the case of *Osbaldiston vs. Askew*, 1 *Russell*, 160. In 2 *Sug. Vend.*, 121, it is stated, that "it is not a conclusive objection to a title, that a third party has filed a bill against the seller, claiming a right to the estate, but the nature of the adverse claim will be examined into." If this be done, the claim asserted by *Poulton* in his bill in chancery, under the circumstances disclosed in the record before us, furnishes no ground against decreeing a specific performance of the contract sought to be enforced against the defendants. It being manifest, that *Poulton's* entire interest in the property in dispute, was legally sold and conveyed to the plaintiff.

The purchase made by *James Owings* of the sheriff of *Anne Arundel* county, who sold *Zachariah Poulton's* interest in the *Guilford Mills* and the adjoining lands, under two writs of *fieri facias*, issued on judgments obtained against him by the executors of *Richard Owings*, being the only title which the plaintiff professes to possess, or to be able to give to the defendants, we are necessarily led to the inquiry as to the nature and character of that title. The executors having issued executions against *Zachariah Poulton*, the only power thereby communicated to the sheriff, or which he could exercise under them, in reference to the property in question, was to seize and sell the interest and estate of *Poulton* therein. What was that interest? An equitable title derived from *Richard Owings*, under a bond of conveyance, and payment of part of the

purchase money. The legal title he could not have bought, because *Poulton* never possessed it, and, consequently, he could not derive it from any deed which the sheriff had authority to execute. And the equitable title, thus purchased by the plaintiff, was held by him, subject to an unquestionable lien for the balance of the purchase money due by *Poulton* to the executors of *Richard Owings*. Conceding, then, that *Richard Owings* was possessed of a legal estate in the property sold to *Poulton*, at the time of the sale, which is the most favorable assumption that can be made for the plaintiff, his title being purely equitable, the defendants were not bound to accept it, and, *a fortiori*, were they not bound to receive it, until disencumbered of such a lien as that which attached to it. Had they accepted it, and, to obtain a legal title, had filed a bill in chancery against the heirs of *Richard Owings*, the chancellor would not have recognised them as having any standing before him, but upon their paying or offering to pay the balance of the purchase money due by *Poulton*.

But the defendants could not be compelled specifically to perform the contract on another ground. The contract not having been reduced to writing, and the statute of frauds being relied on in the answer, as a bar to the relief sought by the bill, it was the incumbent duty of the plaintiff, before he could obtain a decree for specific execution, to prove the act of part performance charged in the bill, it being the only means by which the bar of the statute could be evaded. This act of part performance, viz.: the entering by the defendants into possession, under the contract of the premises purchased, the plaintiff having wholly failed to prove, even if his title were free from all exceptions, to a decree for a specific execution of the contract, he has not shown himself entitled.

The only remaining reason assigned for the reversal of the decree of the chancellor, is, that it did not award to the plaintiff the rent to which, by the proof, he has shown himself to be entitled. In not decreeing such an allowance the chancellor did not err, because the subsidiary contract, which warranted the allowance, was not averred in the bill. It is true, as con-

tended for in the argument for the appellees, that in an action at law, the rent might be sued for and recovered, and that for that reason the plaintiff suffers no loss by its non-allowance by the chancellor. But the institution of such suit now by the plaintiff, would be a fruitless experiment, the statute of limitations being a flat bar to such an action. As the rent in question is justly due to the plaintiff, and might have been decreed to him, had the appropriate averments and prayer been inserted in the bill, this court, believing that justice will not be attained, either by an affirmance or reversal of the decree of the chancellor, will sign an order remanding this case to the court of chancery, pursuant to the 6th sec. of the act of 1832, ch. 302, that the plaintiff, by an amendment of his pleadings, may place himself in a situation to obtain the relief indicated in the aforegoing opinion, and that such further proceedings may be had therein as the nature of the case may require.

CAUSE REMANDED
UNDER ACT OF 1832.

THOMAS S. HAYS, AMOS HOLLIS, AND MARY HERBERT, *vs.* FRANCIS HOLLIS, BY HER NEXT FRIEND, JAMES A. SUTTON.—*December*, 1849.

Relief will be granted against a deed where oppression or imposition has been practised in obtaining it; and gross inadequacy of price is one of the evidences of such imposition or oppression.

Where one person advances the purchase money for land, and a deed is taken in the name of another, a resulting trust is created by operation of law, in favor of the party advancing the purchase money, and parol proof may be used to prove these facts, which, when established, take the case out of the statute of frauds.

No such resulting trust will arise where a settlement or donation is deliberately designed by a party competent to make it.

Payment or advance of the purchase money by *the party claiming the trust*,

before or at the time of the purchase, is indispensable to the creation of such a trust.

In this case relief was refused, because the testimony did not make out a case within the above principles of law.

The rule of law which denies to a party claiming under a deed, the privilege of sustaining it by any other consideration than that mentioned in it, does not allow a grantor or donor to destroy his own deed, by showing a consideration different from the one expressed on its face.

Cases may occur where it may be indicative to a greater or less extent of fraud, imposition, or imbecility, but a smaller or different consideration can never, of itself, avail a grantor or donor, of competent intellect, to avoid his solemn deed, executed with full knowledge and free consent.

Appeal from the *Court of Chancery*.

The original bill in this cause was filed on the equity side of *Harford* county court, on the 21st of May, 1840, by the appellee against the appellants, *Hays* and *Hollis*, praying, upon the grounds therein stated, that one of them *(Hays,)* might be declared to hold certain property which had been conveyed to him by the complainant and her husband, *Amos Hollis*, the other defendant, in trust for her separate use, or that a new trustee should be appointed for that purpose, to whom the said *Hays* should be required to execute a conveyance of the property, and for general relief.

The bill, and supplemental bill, which latter was filed in May, 1843, allege, in substance, that the complainant was, upon her marriage, seized, in her own right, in fee, of a parcel of land containing about one hundred acres, and worth upwards of $2,000. That her husband, from whom she separated some time after the marriage, was a man of intemperate and prodigal habits, and that his interest in said land, whatever it was, acquired by the marriage, after being repeatedly taken in execution, was finally purchased, at a constable's sale, by a certain *Thomas Hendon*. That being destitute of any other property, and having no other home but this, she procured from a friend the money to re-purchase it from *Hendon*, and supposing that, to secure it from the consequences of her husband's extravagance, the conveyance must be made to some third person, the said *Hendon*, and herself, and her husband, by their deeds,

dated respectively on the 3rd and the 12th of September, 1836, conveyed the property to the defendant, *Hays*, under the express understanding and agreement, that it should be held by him, in trust, for the separate use of the complainant, and subject to her control. That no consideration was paid by *Hays* for the land, which was conveyed to him as the friend of the complainant, and for the purpose aforesaid. That the deed from the complainant and her husband to *Hays*, though absolute upon its face, was intended to be in trust for her, and that it was procured by fraud and imposition upon her credulity and ignorance, and that *Hays* now fraudulently denies that complainant has any interest in the property, claiming to hold the same as his own, absolutely. That when the complainant executed the deed, which she never read, she supposed it to be in proper form to accomplish the object contemplated by her, relying entirely upon the representations of *Hays*, &c.

The answer of *Hays* admits that the complainant was seized of the land as stated, and that the husband, an intemperate and improvident man, has, for several years, been living separate and apart from her. That her husband's interest, acquired by the marriage, was levied on by his creditors, and sold to *Hendon*, as stated, and that conveyances at the periods mentioned, were made to him, the defendant, by *Hendon* and his wife, and the complainant and her husband. The trust, however, as charged, is denied in positive terms, and the answer then proceeds to state, that the complainant has no children, and his, the defendant's wife, is her niece, being the daughter of a sister. That *He don* being in possession of the property under his purchase, had, for several years, permitted the complainant to occupy a part of the dwelling house thereon, but in the year 1836, he became disposed to sell his interest, and had agreed with some one for the purchase thereof. That complainant then sent for him, the defendant, and stating that her health was feeble, and that she did not expect to survive her husband, proposed to him, if he would purchase the title of *Hendon*, and would procure her husband to join in the conveyance, she would convey to the defendant her residuary in-

terest in the land, it having always been her intention to give to the defendant's wife whatever property she might have, and that not only was there a total silence in regard to a trust, but that nothing was ever said or alluded to upon the subject of any obligation on the part of defendant, to provide for the support, or to permit the complainant to occupy a part of the dwelling house, as *Hendon* had done, though it is probable she may have believed that he would do so. That the defendant hesitated about making the purchase of *Hendon*, and only agreed to do so upon the assurance that the complainant would join with her husband in a conveyance to him to perfect his title, and the answer avers, that this purchase was the consideration for the deed from the complainant and her husband to him. The answer denies that the purchase money mentioned in the deed from *Hendon* and wife, was paid or furnished by the complainant, and states that it was borrowed from a *Mrs. Herbert*, on a mortgage of the land, and upon his, the defendant's, bill obligatory. That besides the purchase by *Hendon* of the estate of the husband in the land, he, *Hendon*, held a bill of sale of the personal property, and that he, the defendant, bought of *Hendon* this personal property, as well as the land, giving for the land $100, and for the personal property between $50 and $60, the sum of $150 being paid with the money borrowed from *Mrs. Herbert*, and the small balance out of his own pocket. The answer admits, that the money consideration mentioned in the deed from the complainant and her husband to him, was not paid. The defendant avers, that the deed was read to the complainant before she executed it, prior to which she had it in her possession about ten days, and pleads the statute of frauds.

The consideration mentioned in the deed from the complainant and her husband, to the defendant, *Hays*, is $100, and that from *Hendon* and wife, $150.

A great number of witnesses were examined, by whose depositions the following facts were, in the opinion of the chancellor, established:

1st. That the money with which *Hendon* was paid for the purchase of the interest of the complainant's husband, in the land purchased by him at the constable's sale, was procured upon a mortgage of the fee simple interest in the property, and that this fee simple interest was conveyed to the defendant, *Hays*, by the complainant and her husband, to enable him to make such mortgage.

2nd. That the defendant, *Hays*, at the time the negotiation was on foot, said, that it was for the "use or the good of the complainant."

3rd. That the land was worth from $1,500 to $2,000, and that defendant paid but $100 for it, being part of the $150 which was procured upon the mortgage, as aforesaid, the other $50 being paid for some articles of personal property.

4th. That complainant executed the deed to the defendant freely and willingly, and expressed herself entirely satisfied with it, immediately after its execution, at which period nothing was said about a trust.

5th. That the complainant is an aged woman, and has no property but that which is in controversy in this cause, and has not much acquaintance with business transactions.

The cause having been removed to the court of chancery, the chancellor (JOHNSON,) on the 16th of February, 1847, passed an order directing the cause to stand over, in order to make *Mrs. Herbert*, to whom *Hays* had mortgaged the property, a party to the suit. Accompanying this order, he delivered an opinion favorable to the rights of the complainant to the relief asked in the bill, which is reported in 1 *Md. Ch. Decisions*, 79.

The required amendment having been made, *Mrs. Herbert*, in her answer, states that she made the loan to secure which said mortgage was executed "for the use and benefit of the complainant, and upon her earnest solicitation to save her property, which was about to be sold for the claims of *Hendon*;" that respondent required, for her security, a mortgage upon the entire fee simple title, and [illegible] deed both from the com-

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plainant and said *Hays*, the latter was acting merely as the friend in the transaction.

Additional testimony was taken, which is sufficiently stated in the opinion of this court, and the cause being again submitted, the chancellor, on the 30th of October, 1847, passed a decree requiring *Hays* to convey the property to a new trustee, to be held for the sole and separate use of the complainant, subject to the mortgage debt due *Mrs. Herbert*, and to account for the rents and profits subject to such allowances as he might prove himself entitled to, and from this decree the defendants appealed.

The cause was argued before Dorsey, C. J., Chambers, Spence, Martin, Magruder, and Frick, J.

Otho Scott, for the appellants, relied upon the following points:

1st. There was no fraud in the execution of the deeds to *Hays*, they were just such instruments as the parties intended they should be.

2nd. There was no resulting trust to *Mrs. Hollis*. Upon the facts of the case, no such trust could arise, she neither paid the purchase money, nor was it intended she should have the legal estate.

3rd. There was no conventional trust for the benefit of *Mrs. Hollis*, and if there were such a parol agreement, it is void under the statute of frauds.

4th. There was no such inadequacy of price as would invalidate the deeds. The interest of *Mrs. Hollis* was not available to her, she could not sell or devise it, without the consent of her husband, and would derive no benefit from it till his death.

5th. There was no imposition practised upon her, she only conveyed what would have passed, by her death, to the wives of *Hendon* and *Hays*. *Hendon* she had quarrelled with, and she wanted his wife excluded. *Hays* she could safely rely on

for support, from the relation of his wife to her, and she desired that he should have the property.

H. W. Archer, and J. J. Archer, for the appellee, insisted:

1st. That the transaction on the part of the appellant, *Hays*, was fraudulent.

2nd. That the price paid by the appellant, is grossly inadequate, that a court of equity will relieve against the deeds, as against conscience, unreasonable and oppressive.

3rd. That there is a resulting trust in favor of the appellee, under both deeds, to appellant, *Hays*.

4th. That the statute of frauds is no bar to the relief sought by the appellee.

Chambers, J., delivered the opinion of this court.

The propositions of law, on which the appellee relies to sustain the decree in this case, may all be conceded, to wit: that a fraudulent deed can convey no title to the grantee; that relief will be given where oppression or imposition have been practiced, and that gross inadequacy of the price paid, is one of the evidences of such oppression or imposition; that where one person advances the purchase money for land, and a deed is taken in the name of another, a resulting trust is created by operation of law, in favor of the party advancing the purchase money, and that parol testimony may be resorted to, for the purpose of proving these facts, which, when established, take the case out of the statute of frauds. The material inquiry, then, is, has the testimony established such a state of case as these principles of law embrace?

Upon the bill and answer, alone, there can be no ground on which the complainant below, the appellee here, can claim relief. The agreement by *Hays* (the defendant below,) to purchase the property, as the friend of the complainant, and for her use, as alleged in the bill, is most positively denied. The bill avers, that complainant induced *Hendon* to sell his interest to *Hays*, for her advantage and use. The answer asserts, that

Hendon was about to sell to a stranger, when he was urged by complainant to interpose, not to purchase for her, but for himself; and in regard to the allegation, that *Hays* volunteered his agency in originating and arranging the conveyance from *Hendon*, the answer asserts, and the proof is clear, that *Hays* reluctantly engaged in the transaction.

The material charges in the original and supplemental bills, without stopping to notice apparent inconsistencies, are, that the conveyances to *Hays* were made "upon the express understanding and agreement, previously entered into between them, that *Hays* would hold the lands, and all the title and interest conveyed, in trust for her sole and separate use, and would pay to her the rents and profits as they accrued, and would afterwards execute a proper instrument declaratory of the trust, or would re-convey it to her in such manner as to secure it to her and her heirs, exclusive of her husband." That this was done in consequence of the suggestion by *Hays*, that it was necessary to avoid the waste of her property by her husband; that "it was perfectly understood between them, he was to hold the property as trustee, and subject to her exclusive direction and control."

The supplemental bill alleges, that the complainant supposing that, to secure the land from her husband's liabilities, it was necessary the legal title should be conveyed to some other person, *Hendon*, and her husband, and herself, made the deeds to *Hays*, to be held for her sole and separate use, and subject to her disposal; "that she designed and intended her deed to have the operation and effect of a deed of trust," and a fraud is charged for causing the deed to be prepared as an absolute deed, without a trust. To these charges the defendant was called upon to answer, and he has denied them all in the most peremptory terms.

He says, that the interest of her husband in her land, had been sold, as also all his personal property, and was then in possession of *Hendon*, who had permitted her to occupy a room in the house, *Hendon's* wife and *Hays'* wife being her nieces and nearest of kin: that, after the property was sold, she and her

husband had separated; that *Hendon* intending to remove, was about to sell the land and house to a stranger, and in this state of things the complainant applied to him, and more than once urged him to purchase the property of *Hendon*, assuring him she did not expect to out live her husband, as her health was feeble, and that she always had intended to give her property to the wife of *Hays*, and if he would purchase *Hendon's* interest, and procure her husband to join with her in a deed, she would convey her reversionary interest to him. Now it must depend upon the proofs in the cause, which of these conflicting statements we are to adopt, not, however, forgetting that the complainant is before us impeaching her own deed, nor that the defendant is entitled to have his answer respected, until overthrown by testimony.

As a preliminary remark, it may be said, that in a case where an old lady, not charged with the cares of a family, and circulating in a general society, had suddenly come again into the possession of her estate, after having seen it for many years in other hands, she would be very apt to furnish very impressive evidence of her conviction, at least, if not of her gratification, at such a restoration. In this case, some of the witnesses have gone into all her declarations used in many conversations on the subject of the land and the deeds, and yet, until about the time of filing the bill, no one of the many persons who seem to have conversed with her, testify to a word from her, indicating any such conviction of the improvement in her pecuniary condition. It would also be most probable, that an owner, on being restored to the direction and control of property, and to the pernancy of netts and profits, under such circumstances, would not be slow to express to those concerned in the actual conduct of the estate, some distinct and intelligible indication of her claim to the substantial fruits of these rights. Such is the character of the evidence which would be consistent with the case alleged by the complainant. Let us see if it meets this expectation.

Mrs. Mary Ann Smith, on whose testimony the appellee chiefly relies, says the appellee, *Mrs. Hollis*, first applied to

the deponent for the money, (to pay *Hendon,*) "for the use of *Hays;*" that *Hays* obtained the money, through the agency of *Mrs. Hollis,* from *Mrs. Herbert,* who inquired how she was to be secured, that she wanted a mortgage, and asked whether *Mrs. Hollis* had given him a deed, and *Hays* replied, that *Mrs. Hollis* "had given him a deed:" on being asked by *Mrs. Herbert* what was to become of *Mrs. Hollis, Hays* told her "it was for her use or her good." This last expression, is the only one sworn to by any witness in the cause as coming from *Hays,* which indicates any purpose on his part to hold the property in any other way than as absolute owner. But it must be taken in connection with other parts of the conversation. *Hays then had* a deed—both *Mrs. Herbert* and *Mrs. Smith* knew this fact—they knew it was a deed which enabled him to give a mortgage to secure the loan, and *Mrs. Herbert* had stated that *Mrs. Hollis'* reversion must be conveyed to effect this; in other words, *Hays* must have the fee-simple to give a satisfactory security. Surely, then, it was not possible that either *Mrs. Herbert* or *Mrs. Smith* could understand, that the deed was to give *Hays* a mere nominal title as trustee for the use of *Mrs. Hollis.* If they, then, were informed that *Hays* was to make a deed to any other person as trustee for *Mrs. Hollis,* it is certainly very remarkable, that not an allusion should be made to such an arrangement, but that, on the contrary, it was thought necessary or proper to admonish *Mrs. Hollis* of the danger she incurred in "making over her property" to *Hays. Mrs. Herbert* "*understood,* that a deed was to be executed by *Mrs. Hollis* and *Hendon,* to *Hays,* and that *Hays* was to convey it back again to *Mrs. Hollis;*" but when or from whom, or why she so *understood,* she does not inform us, nor does her deposition state one fact which justifies such an understanding. Of the large number of witnesses sworn, these two alone have testified to anything which looks like an agreement or acknowledgment of *Hays,* that a trust was contemplated, and we cannot but think, if this testimony and none other was before the court, without an answer and without

objection, there would be great difficulty in determining that it proved any contract.

There is, however, a great preponderance of testimony to sustain the answer; *Hendon's* wife was co-heiress apparent to *Mrs. Hollis*, yet, it had never been heard in his family that *Hays* was to hold the property as trustee.

Pierce, one of the magistrates who took her acknowledgment, deposes, that *Mrs. Hollis* spoke of the deed she was about to make to *Hays*, expressed the utmost gratification, when it was done, that she had "*concluded* what she had long had upon her mind;" that "she wanted *Hays* and his wife to have the property, she was getting old and they would support her." Is this language consistent with the idea, that the deed was virtually a deed for her own exclusive benefit; a deed that did not give one farthing to *Hays* and his wife; a deed that gave the rents and profits, and the entire and exclusive control of the property, not to *Hays*, but to herself?

Norris, the other acting magistrate, proves, that *Mrs. Hollis* expressed herself well satisfied with what she had done; that "she always intended the land for *Hays* and his wife, that though it was not valuable, it would do for a home for them and their children." Both depose, that she did not say one word about any trust in the deed, then or afterwards. Is this conduct or these declarations consistent with an existing conviction of title, vested by that deed, or to be vested by any future deed in herself?

Rogers deposes to a conversation with *Mrs. Hollis*, in which she not only expressed her reasons for giving the property to *Hays*, "all her right and title," "*for nothing*," but assigned the reason, that "*Mrs. Hays* was the poorest of her nieces, and she wished her to have it;" and in frequent conversations, both before and after the deed, he "never heard her intimate, that *Hays* held it in trust, or was to reconvey it to her or any one else."

To all this mass of testimony the appellee's counsel oppose the fact, that the inadequacy of price is, of itself, conclusive, either of fraud in procuring the deed or of a resulting trust.

We do not think this a case of inadequacy of price, or affected by the rules which govern that class of cases. There was, between these parties, no price paid at all—not one dollar—nor was it a sale. The purchase was made by *Hays*, of *Hendon's* interest in the land and personal property, as we think the agreement required, and the consideration for that purchase is truly stated. *Mrs. Hollis* agreed to convey her reversionary interest to her niece's husband, if he would purchase *Hendon's* interest, and obtain the husband's consent to unite in a deed. But, say the counsel, it is incredible that she would make such an arrangement, unless she is imbecile to a degree which demands the protection of the court, because it strips her of every farthing she has, and leaves her destitute. Well, she had the power to do this if she pleased, and witnesses, who are not impeached, swear, they cautioned her not to convey away all her estate, and yet she would do so. That she has no intellectual infirmity, which requires the interposition of chancery, is abundantly proved. But, is it the effect of this deed to reduce the complainant to a more destitute and dependent condition? The property had been sold, the personal, with no prospect of its ever being restored to her, and the land for the joint lives of her husband and herself, he being much younger and of better health. It had been held by her niece's husband, and she had occupied part of the house; it was about to be sold, and to be sold to a stranger, with every probability of her being turned out of the house. She had become displeased with the family of *Mrs. Hendon*, her niece, with whom she had resided, and her only near relative was *Mrs. Hays*, to whom it was her wish that all her property should go. It would seem to be a just expectation, that her condition without her deed, would be one of complete dependence, and her only reliance for assistance or comfortable accommodation, so far as the record shows, must have been alone upon *Hays*. She did, in fact, as she told one of the witnesses, expect *Hays* to take care of her.

It was by no means, then, so very remarkable that she was willing to convey her reversionary title to *Hays*. It afforded

her no part of a maintenance if she retained it, and it does not appear for what it would have sold, if put into the market, or that the idea of selling it was ever suggested by her or to her. By conveying it to *Hays*, she could reasonably expect to strengthen the claims, which already made it his duty to assist the aunt of his wife, and also effected a purpose which she seems to have cherished with much earnestness; not the less perhaps, after the domestic collision with her other niece's family.

The appellee's counsel has misapplied the law, which denies to a party claiming under a deed the privilege of sustaining it by any other consideration than that mentioned. The doctrine does not, most surely, allow a grantor or donor to destroy his own deed, by showing a consideration different from the one expressed on its face. Cases may occur where it may be indicative, to a greater or less extent, of fraud, imposition or imbecility, but a smaller or a different consideration never can, of itself, avail a grantor or donor of competent intellect to terminate the obligation of a solemn instrument, which he has executed with full knowledge and free consent.

We have been much pressed with the argument, that a resulting trust must be decreed, because the money paid by *Hays* was raised by loan, secured by a mortgage on the land, and not advanced, as it is said by *Hays*. The chancellor seems to have based his decree on that ground. Now, if what we have assumed, be the facts of the case, there is no implication arising from the circumstance, that the money was furnished at the solicitation of *Mrs. Hollis*, or by pledge of the title. If *Mrs. Hollis*, herself, had furnished the money from her own purse to pay *Hendon*, with a view to secure the property to *Hays*, there would not still be a foundation for any such legal presumption in this case. No such trust will arise, where a settlement or donation is deliberately designed by a party competent to make it. See the case of *Dyer and Dyer*, *White's Eq. Cases*, 138, with the very full references in the notes reported in 65 *Law Lib*, 167.

Indeed, the material fact of the advance by the complainant

of the purchase money to *Hendon* is not sustained, without which a resulting trust could not arise, so far as related to the interest conveyed by *Hendon*. Payment or advance of the purchase money by the party claiming the trust, before or at the time of the purchase, is indispensable. Here the purchase money was loaned, not to the complainant, but to *Hays*, and he alone became liable, personally, for the amount, besides giving the security of a mortgage.

The court will sign a decree, reversing the decree of the chancellor, and dismissing the complainant's bill, but, under the circumstances, without costs.

DECREE REVERSED, AND
BILL DISMISSED.

Airheart Winter *vs.* Joseph S. Donovan.—Joseph S. Donovan *vs.* Airheart Winter.—*December*, 1849.

In an action of slander, the plaintiff cannot offer evidence in aggravation of damages, until he has offered some testimony tending to prove the charges in the declaration.

Where a party is not called upon to say for what purpose he designs to offer the testimony objected to, there will be error in the court's rejection of it, if it was admissible for any purpose.

The second count in the nar, charged the defendant with writing a libellous letter to the witness, on the 3rd of July, 1845, charging the plaintiff with obtaining $300 from defendant, on false pretences. Without proof of any of the counts, the plaintiff asked the witness "if, at any time during the summer of 1845, he received from defendant any letter or letters relative to the employment of the plaintiff, by defendant, as his agent, and the advance by the former to the latter of $300, on account of such agency, and the charge against the latter of having obtained the sum by false pretences?" Held: that this was a leading question, and was properly rejected.

An answer in the affirmative would not have proved that the alleged libel corresponded with the allegation in the second count of the nar, and would have been parol proof of the contents of a written paper, without its appearing that any effort was made to get possession of the paper itself.

Winter vs. Donovan.—1849.

If a defendant, after publication of a libel, takes possession of it, and retains it, he must have notice to produce it, and refuse, before parol evidence can be given of its contents.

Slight variances between the words charged, and the words contained in the libel, will prove fatal, and the contents of a libel cannot be proved by parol, until some attempt has been made to produce the libel itself.

A party who objects to the admissibility of testimony in the court below, is not, upon appeal, confined to the objection there relied on.

Unless a party can show that he has been injured by the judgment of the court below, he cannot ask for its reversal by this court.

Cross-appeals from *Baltimore* county court.

This was an action of *libel and slander*, instituted by *Winter* against *Donovan*, on the 20th of May, 1836.

The declaration contains three counts. The *first*, charges, with the usual inuendos, the defendant with publishing the following libel in a certain letter written by him to the plaintiff, dated 3rd of July, 1845, viz: "Yours of the 1st instant I received, and from your statement, I am now fully convinced that you had obtained the $300 under false pretences." The *second*, charges, that defendant published the following libel of the plaintiff in a letter written to one *Lewis Winter*, dated the day and year aforesaid, viz: "He obtained from me $300 under false pretences, and if the money is not returned to me, I will prosecute him." The *third*, charges him with speaking the words contained in the *second* count, with these additions: "*Airheart* got that money by false pretences, and should be prosecuted for it." "He is a scoundrel, having obtained from me $300, on false pretences."

The defendant pleaded *not guilty*, on which issue was joined.

1st Exception. The plaintiff called *Lewis Winter* as a witness, and asked him if he had received, in the summer of 1845, a letter from the defendant, in relation to the plaintiff? Which question witness declined answering, because the answer to it would tend to criminate himself; but the court (Le Grand, J.,) decided that witness should answer the question, and should produce the letter, if he had it, and compelled him

to answer it. To which opinion of the court, the defendant excepted.

2ND EXCEPTION. The plaintiff then asked witness if he knew the defendant in this cause? Witness replied affirmatively, and thereupon, the plaintiff asked of him the following question: "Did you, at any time during the summer of 1845, receive from the defendant any letter or letters having relation to the employment of the plaintiff by the defendant, as his agent for the purchase of negroes in *Carroll* county, and the advance by defendant to plaintiff of $300, on account of said agency, and the charge against the plaintiff of having obtained the sum by false pretences?" To which question the defendant objected, and submitted that the inquiry should be confined to the letter sued upon, as of the 3rd day of July, 1845, and the court sustained the objection, and refused to permit the question to be put to the witness, to which opinion and refusal the plaintiff excepted. The verdict and judgment being for the defendant, both parties appealed to this court.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, MARTIN, and FRICK, J.

JOHN NELSON, for the appellant, in *Winter's* appeal, argued:

The appellant contends, that the court erred in the opinion thus expressed, and that the evidence proposed to be offered by the witness, was admissible upon various grounds.

1st. It was admissible to show the fact of the publication of the libel described in the second count of the plaintiff's declaration. If the witness had answered, that he had received such a letter during the summer of 1845, the plaintiff might have proposed the inquiry, whether it was of the date of the 3rd of July, 1845? and might have required the production of the letter itself, the date of which would have been the best evidence of the time at which it was written. But the court ruled out the whole inquiry, by rejecting, as inadmissible, the question propounded.

2nd. But can there be any boubt, whatever may have been the date of the letter inquired of, that, assuming it to be of the character given to it by the question, it was evidence in aggravation of damages?

The cases affirming this principle, are numerous and clear. They will be found collected in 2 *Starkie's Slander*, 47, 53. 2 *Sergt. & Rawle*, 469, *Kean vs. McLaughlin*. 2 *Starkie's Rep.*, 93, *Stuart vs. Lovell*. 1 *Strange*, 691, *Chambers vs. Robinson*. 5 *Espinasse*, 136, *Plunkett vs. Cobbett*. 2 *Camp.* 72, *Finnerty vs. Tipper*. 3 *Pickering*, 376, *Bodwell vs. Swan*.

The case of *Duvall vs. Griffith*, 2 *Harris & Gill*, 30, will be found to be conclusive upon this point.

That the plaintiff had the right to offer his evidence in any order he might choose, the case of *Davis vs. Calvert*, 5 *G. & J.*, 269, directly decides.

Geo. R. Richardson, attorney general, for appellee:

The plaintiff having described, in his declaration, the letter relied upon, it is submitted, that even if witness had received, and would produce any number of letters *written during the summer*, that no *one*, other than a letter of the 3rd of July, 1845, would have been evidence for the purpose of sustaining the charge in the declaration. 1 *Starkie on Ev.*, 433.

Having, then, no right to use (if produced,) any other letter for *this purpose*, is it not clear that the plaintiff cannot, to *sustain the allegation*, ask *for letters generally?* But it is contended on the part of the appellant: 2ndly. That any letters sought by the inquiry, even if not evidence to sustain the charge, were admissible in aggravation of damages, and that the plaintiff had a right to offer his evidence in any order he might choose. This proposition concedes that the plaintiff sought, by the inquiry, other letters than the one necessary to sustain the declaration, and claims the right to have them in aggravation of damages. He claims the further *right* to *aggravate damages*, before he has proved the charge declared upon. The proposition further concedes (the object being merely to obtain

the letter of the 3rd of July,) that the inquiry is *too broad.* Had he, then, a right to aggravate damages before he proved the principal charge?

In the case of *Duvall vs. Griffith*, 2 *H. & G.*, 30, the charge laid was first proved, and although, in the case of *Davis vs. Calvert*, the court decides, that a party may offer his evidence in such order as he may choose, it is submitted that the rule can have no application to such a case as the one now before the court. *Aggravate damages for what?* For an injury *not proved?* and for *one* which the proposition concedes *is not proposed to be proved by the inquiry?* Let it be again remarked, that, for the purpose of obtaining the letter of the 3rd of July, the inquiry is too broad; and if it can be sustained at all, it is only for the purpose of procuring evidence to prove malice. For to test the law of this case, let it be supposed, that the question had, by the direction, been answered, and any number of offensive letters, other than one dated 3rd of July, had been produced, the plaintiff says, they would have been evidence in aggravation of damages. Now even supposing them admissible for this purpose, they never could have been read until the principal charge was proved, or, if read, only on condition that they were to be in the case when the charge was proved, as laid in the declaration. If, therefore, the plaintiff never put a *proper inquiry* to obtain the letter of the 3rd of July, all evidence in aggravation would fall harmless, he having failed in the proof of the charge laid.

Magruder, J., delivered the opinion of this court.

The plaintiff here, was the plaintiff below. His action was brought for slander and a libel. The plea was not guilty, and verdict for the defendant.

In the course of the trial, the plaintiff took one exception. It does not appear that he offered any proof whatever, in support of any one of the allegations to be found in his declaration. As far as we can judge, of the *first* witness he called up, (after asking him if he knew the defendant,) he at once asked the question: "Did you, at any time during the summer of

1845, receive from the defendant any letter or letters having relation to the employment of the plaintiff, by the defendant, as his agent, for the purchase of negroes in *Carroll* county, and the advance, by the said defendant to the said plaintiff, of $300, on account of said agency, and the charge against the plaintiff of having obtained the same by false pretences?"

The question being objected to by the defendant, the court decided that it was inadmissible, and to that decision the plaintiff excepted.

As the plaintiff was not called upon to say for what purpose he designed to offer the testimony, the court would have erred, if for any purpose it was admissible.

It might have been offered to increase the damages, but for such purpose, it was inadmissible, until some testimony had been submitted tending to prove any one of the matters charged.

If offered to prove the plaintiff's case, it must have been to establish the second count in the declaration.

It was certainly a leading question, and if answered in the affirmative, would not have proved that the allleged libel corresponded with the plaintiff's allegations in the second count of his declaration.

An answer in the affirmative, would have been parol proof of the contents of a written paper, when *non constat*, that any effort was made to get possession of the paper itself. If the defendant, himself, after a publication of the libel, had taken possession of it, and retained it in his possession, he must have notice to produce it, and refuse, before parol evidence can be given of its contents. *Starkie on Libel*, 383.

Slight variances between the words charged, and the words contained in the libel, will prove fatal. *Ibid*, 279. And surely the contents of a libel are not to be proved until some attempt has been made to produce the libel itself.

If, to the admissibility of testimony, objection be made in the court below, the party objecting is not, upon appeal, confined to the objection which it would seem was there relied on.

JUDGMENT AFFIRMED.

In the case of *Donovan's* appeal, the verdict having been in his favor, and the judgment affirmed, as above, he cannot be injured by the decision of which he complains, and, of course, cannot ask a reversal of the judgment.

JUDGMENT AFFIRMED.

JOHN TOLSON *vs.* HENRY TOLSON, ET AL.—HENRY TOLSON, ET AL., *vs.* JOHN TOLSON.—*December*, 1849.

The complainant filed a bill claiming the benefit of a trust or charge in his favor, contained in the will of his father. The defendants, the other devisees, demurred to this bill, on the ground that the clause in the will relied on, was too vague and uncertain in its terms, to create such a trust or charge. The chancellor sustained the demurrer, but this court, on appeal, reversed the decree dismissing the bill, and passed a decree remanding the cause, that the court of chancery might refer it to the auditor, with instruction to state an account of the allowance to be made to complainant, under certain directions expressed in the decree of this court. This decree was silent as to the right of the defendants to answer. HELD: that the defendants were not precluded, by this decree, from answering the original bill, and taking full defence upon the merits.

It was not competent to this court to allow the defendants to withdraw their demurrer and answer over, though provision for doing so in the court below, might have been made in their decree.

Upon a second appeal in the same case, this court may look into and decide questions involved in the record previously brought up, not decided upon the former appeal.

The reference in the decree, to the "condition and habits of life of complainant and his father," was intended to allude to the extent of the estate, and their mode of living, as to expensiveness, economy, &c., and not to denote the complainant's condition relative to his wife and children; it was, therefore, error to average estimates of the sum necessary to support complainant, as the head of a family, with estimates of what was necessary for his individual support.

This court, by saying that the entire real estate was chargeable with complainant's claim, did not design to confine the chancellor to any particular mode of securing the complainant the benefit of this lien. There is mani-

fest advantage of adjusting the rights of all parties, and arranging the accounts accordingly.

The widow of one of the defendants can only be chargeable in respect of her dower, and her child only as heir to the father.

A portion of the estate which descended to the complainant, like every other part of the real estate, is to be charged with its proportionate share of the allowance to be made to him; the proper mode of making this charge, is by crediting this share against his claim.

Interest is properly chargeable at the expiration of a year, if any balance of the allowance then remains due.

Cross-appeals from the *Court of Chancery*.

The original bill was filed on the 12th of March, 1834, by *John Tolson*, and *Eleanor*, his wife, and their adult and infant children, against *Henry*, *Edward*, *William*, *Alfred*, *Thomas*, *Alexander*, and *George Tolson*, the other heirs at law and devisees of *Francis Tolson*, deceased, and states, that the said deceased, by his last will, devised his estate to and amongst his children, other than the complainant *John*, and requested his other sons to take care of their brother, the complainant *John*, and his family, which said request created a trust in, and imposed a duty on said other sons, to provide for the said *John* and his family, a comfortable support and maintenance during their lives. That said sons have received large estates under the provisions of said will, but have failed to provide for the complainants; and that the amount which they, the complainants, have received for each or any year, has not exceeded $60, and it prays, that the said sons may be required to pay to the complainants an equivalent for their subsistence from the time of the testator's death, and also to provide for their future support.

The clause in the will of *Francis Tolson*, supposed to create this trust, after devising all the residue of his estate to his seven sons, the defendants, proceeds: "I request my seven sons, above named, to take care of their brother, *John Tolson*, and his family; also the children of my late granddaughter, *Ann Middleton*, and my grandson, *Arthur C. Catlin*."

To this bill the defendants demurred, and the chancellor, (Bland,) on the 17th of April, 1837, being of opinion, that

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the request of the testator in favor of his son, *John Tolson, and his family*, is so indefinite and uncertain, that it cannot be considered as the foundation of any trust or claim, as set forth in the bill, sustained the demurrer, and passed a decree dismissing the bill.

From this decree the complainants appealed, and the Court of Appeals, at December term, 1838, reversed the decree of the chancellor, and, on the 16th of February, 1839, passed the following decree:

"The proceedings in this case being read and considered by the court, it is thereupon adjudged, ordered and decreed by the authority of this court, that the decree passed by the chancellor in this case, be and the same is hereby reversed, and the said cause is hereby remanded to the chancery court, that the same may be referred to the auditor of that court, with instructions to state an account from such proof as may be adduced before him, ascertaining what sum it would be proper to allow for the complainant, *John Tolson*, per annum, as and for a maintenance and support, dating from the day of the death of his father, *Francis Tolson*, the testator in the proceedings in said cause mentioned, regard being had, in making such ascertainment, to the conditions and habits in life of the said testator and the said *John Tolson*, and also to the value of the property devised and bequeathed by the said father to the defendants. It is further adjudged, ordered and decreed by the authority aforesaid, that after the report of the auditor, as aforesaid, the chancery court shall pass a decree, directing the payment to the said *John Tolson* of such sum as the said court may deem proper to be allowed him, for his support, &c., from the death of the said *Francis Tolson* to the date of said decree; and shall further decree the payment of such sum annually thereafter, as the said court may think a fair support for the said *John Tolson*. And it is hereby further adjudged, ordered and decreed, that the sum which may be allowed to the said *John Tolson*, from the death of his father to the date of the decree, as aforesaid, and also the annuity which may be decreed him to be paid annually thereafter, as aforesaid, shall be a charge

upon the entire real estate devised by the said *Francis Tolson* to the defendants, and that said real estate shall be answerable therefor."

This decree was signed by STEPHEN, ARCHER and CHAMBERS, J., and the opinion of the court on said appeal is reported in 10 *Gill and John.*, 159.

The cause was reinstated in chancery on the 22nd of April, 1839. The death of *Alfred Tolson* was suggested on the docket, and the surviving sons, *Henry*, *Edward*, *William*, *Thomas*, *Alexander*, and *George Tolson*, filed their petition, asking leave to file answers to the bill, stating, that the demurrer was filed by consent, and for the especial benefit of the complainants, in order to save their costs, and enable the court to decide, in the cheapest and most expeditious manner, the true construction of the will of the deceased, and was never intended to deprive the defendants of the payments and equitable offsets they had to the claim. They filed likewise an affidavit, that *Alfred Tolson* died about the 7th day of April, 1837, leaving a widow, *Elizabeth Tolson*, and one child, *Wilhelmina Tolson*, a minor.

On this petition the chancellor, by order, passed 1st May, 1839, declares, that the cause was abated by the death of one of the parties, "and that no further proceedings can be had therein, until it has been regularly revived by a bill of revivor. And it is clear, that so much of the petition as prays for leave to answer must be rejected, because the chancellor can, in no respect, vary or depart from the terms of the decree of the Court of Appeals, which does not intimate, that the defendants are to be allowed to answer." He therefore dismisses the petition.

On the 22nd of July, 1840, *John Tolson* filed his bill of revivor against the widow, and only child and heir at law of *Alfred Tolson*, who, in their answers thereto, allege, that the devisees of said *Francis Tolson* have, since his death, made large advances to complainant for his maintenance; that he and his family have always occupied, free from rent, a very good farm, belonging to the estate of the testator, worth about

$200 per annum, and insist, that an account should be taken of these advances, and that the whole real estate of the deceased, some of which has been sold, is chargeable with whatever may be decreed to complainant.

The complainant excepted to these answers, because they attempt to make defence to the merits of the case, as stated in the original bill, when they ought to be confined to the matters stated in the bill of revivor. The chancellor sustained the exceptions by an order, passed 9th July, 1842; and, by an order passed 25th July, 1842, referred the cause to the auditor for an account, as directed by the decree of the Court of Appeals.

On the 11th of July, 1843, the auditor made his report, in which he allows the complainant for his support, from 1st January, 1825, (the day of the death of *Francis Tolson*,) to 1st July, 1843, at the rate of $250 per year, reducing that sum, by $60 per year, from 1st January, 1825, to 1st January, 1834, according to the admissions of the bill. The sum made over to complainant by the account, is $6,084.41. The defendants excepted to the report, and filed a petition for leave to take further testimony. In this petition, they suggest the death of some of the original parties, and the insolvency of others.

On the 10th of November, 1843, the cause was ordered to stand over, with leave, by an amended or supplemental bill, to introduce such new matter as may have arisen out of, or been occasioned by, the death or insolvency of some of the parties, and to make such other persons parties, as may be deemed necessary and proper.

A bill of revivor and supplement was accordingly filed, suggesting, that *Thomas H. Tolson*, who had been named as a defendant to the original bill, and in whose name a demurrer thereto had been filed, died prior to the filing of the bill, intestate, and without issue; and that under the limitations contained in the will of the testator, *Francis Tolson*, the estate of *Thomas* had devolved on his brothers, named as parties to the original bill, and that they were in actual possession and enjoyment of that estate when the bill was filed. That *Wihel-*

mina Tolson had died intestate, and without issue, and her interests had devolved on persons named as her heirs at law; and that *Edward Tolson* had applied for the benefit of the insolvent laws, and *William H. Tuck* had been appointed his permanent trustee; and that some of the defendants were non-residents.

Henry, *William*, *George S.*, and *Alexander H. Tolson*, answer and admit the deaths of *Thomas R.* and *Wihelmina Tolson*, as stated in the bill, and say, that *Edward Tolson's* share of his father's estate is now held and owned by *Henry Tolson*. They also aver, that *John Tolson*, the complainant, has received a reasonable support from them.

William H. Tuck answers and admits, that he is the trustee of *Edward Tolson*, but denies that he has ever received any portion of his estate. He claims that part of the estate of *Wilhelmina Tolson*, which descended from her to *Edward Tolson*.

On the 6th of November, 1844, a decree, *pro confesso*, was passed, after order of publication duly published, against *Edward Tolson* and *George Semmes*, and *Mary*, his wife, the non-resident defendants.

Horatio Edelen, and *Eleanor*, his wife, answer and say, they have sold their share of the estate of *Wihelmina Tolson* to *Alexander H. Tolson*, and therefore disclaim all interest in this suit. But if they are accountable, they insist on all the defences taken in the answer of *Henry Tolson* and others.

On the 8th of January, 1846, it was agreed, that an appearance shall be entered for the non-resident defendants, and that they shall have the benefit of every defence they could take, if they had filed answers similar to the answer filed by *Edelen* and wife; that a general replication be entered, and the cause sent at once to the auditor for an account, and an order was passed accordingly.

Depositions were then taken on both sides, the substance of which sufficiently appears from the exceptions of the parties and reports of the auditor.

Complainant excepted to so much of the testimony as goes to show any greater yearly profits to the complainant, down to

the filing of the bill, in 1834, than the sum of $60, admitted in the bill.

On the 5th of March, 1847, the auditor made a further report, accompanied by two accounts. In account A, he assumes that complainant, as the head of a family, ought to be allowed $225 per annum, that he was maintained at the cost of defendants, up to 1st January, 1830, and subsequently received an equivalent to the amount of $60 per year. The sum made due on these principles, 1st March, 1847, is $4,280.22. In account C, he assumes that the proper allowance to be made him, as a single man, ought to be $175 per annum, and then adopting the other principles assumed in account A, the sum ascertained to be due, is $2,005.39.

The complainant excepted to the report and accounts on the grounds: 1st. That the reasonable allowance for his support, ought to have been $250 per annum. 2nd. That this allowance ought to date back from the 1st January, 1825, the day of the death of the testator. 3rd. That no deduction should be made from the above allowance, beyond the sum of $60 per year. And 4th. That no deduction, whatever, should be made from the time of the filing of the bill.

The defendants, by their exceptions, insist in substance: 1st. That the complainant was maintained by them sufficiently, and no allowance, whatever, ought to be made to him. 2nd. That the allowance made him by the auditor, is excessive, and the principles assumed in ascertaining that allowance, are erroneous. 3rd. That the liability of the several devisees of *Francis Tolson*, deceased, is several, and should be proportioned according to the values of their respective estates, and not joint, as assumed by the auditor.

The cause was submitted on these exceptions, and the chancellor (Johnson,) passed an order, dated 14th of June, 1847, referring the case again to the auditor, with instructions to state an account, in conformity to the views expressed in the follow- opinion:

"The Court of Appeals decided, in this case, that the devise in the will of *Francis Tolson*, so far as regarded the family of

his son, *John*, failed for uncertainty, but that this did not affect the devise to *John;* and in the decree passed in February, 1839, it was ordered that the cause be remanded to this court, that an account might be taken upon proof to be adduced before the auditor, for the purpose of ascertaining what sum it would be proper to allow, *per annum*, for the support and maintenance of the said *John*, dating from the day of the death of the testator, regard being had in making such ascertainment, to the condition and habits in life of the testator, and his son, *John*, and also to the value of the property devised by the father to the defendants. It was further decreed, that the sum which may be allowed said *John*, from the death of his father to the date of the decree, and also the annuity which may be decreed to be paid him thereafter, shall be a charge upon the entire real estate devised by the testator to the defendants, and that the said real estate shall be answerable therefor.

"The cause was accordingly remanded, and comes now before this court, upon exceptions to the report of the auditor, made in conformity with the decree of the Court of Appeals. In the bill which was filed in March, 1834, it was stated, that the complainant, *John Tolson*, had received, for each year since the death of the testator, from his devisees, an amount not exceeding $60 *per annum*, but that they now (that is, at the period of filing the bill,) refuse to give him anything. This bill was demurred to, and there is no evidence that the defendants, or any of them, have ever made *John Tolson* any allowance since it was filed. There is evidence, however, that *John Tolson*, from the period of the death of his father, up to the year 1829, occupied and worked a farm devised by the testator to his son, *George*, from which time, for three or four years, he cultivated the same farm on shares, with one of the other sons, and that, from the latter period, until December, 1845, when he left the State, he lived on other portions of the estate left by the testator.

"Looking to the opinion and decree of the Court of Appels, the chancellor thinks that the true test in determining the amount of the allowance to be made to *John Tolson*, is his condition

and habits, and the value of the estate devised by the testator to the defendants, his seven sons. The testator, no doubt, intended that the request which he made of his seven sons, should go beyond the mere taking care of his son, *John*. They were to take care of him and his family; but the uncertainty of the term "family," rendered that part of the will void, and the duty of the seven sons is restricted to the maintenance and support of *John*, *alone*. In my opinion, the nearest approximation which can be made to the amount which shall be allowed for the support of *John Tolson*, will be attained by making an average of the testimony of all the witnesses who have testified upon the subject, as well those who speak of him as the head of a family, as those who testify to what it would cost to support him as a single man.

"I am also of opinion, that if, from the death of the testator, in 1824, the evidence shows, that *John Tolson* was in possession and use of property left by the testator, equivalent to his support, that no further allowance is to be made him during the period of such possession and use, as it must be presumed that the Court of Appeals did not mean to give him more than a support, or to give him that of which he had been already in the enjoyment. I am further of opinion, that the credit of $60 *per annum*, is to stop with the filing of the bill, unless it be shown, by the proof, that it was paid to *John Tolson* subsequent to that period, unless he received some equivalent advantage.

"In ascertaining the amount of the benefit enjoyed by *John Tolson*, from the possession and use of property left by the testator, the auditor will make an average of the testimony, including *Mary Ann McPherson*. The evidence in relation to the value of the estate devised and bequeathed by the testator to the defendants, is somewhat indefinite, but the chancellor, nevertheless, thinks, that upon a fair construction of it, and especially of the proof of *Thomas Berry*, returned on the 11th of July, 1845, that sufficient *data* may be found, upon which such an account as is contemplated by the Court of Appeals, may be stated. The Court of Appeals having decided, that the

sums which shall be allowed *John Tolson*, from the death of his father to the date of the decree, and also the annuity which may be decreed to be paid him annually thereafter, shall be a charge upon the entire estate devised to the defendants, and that said real estate shall be answerable therefor, the chancellor thinks that the entire estate is liable for the entire sum *in solido*, and that, consequently, there is no necessity for an account charging each devisee for his proportion, however convenient such an account might be, for the adjustment of the affairs of the defendants *inter sese*. The chancellor also thinks, that the said defendants are chargeable with interest on the balance due for each year, as stated in former reports of the auditor."

On the 7th December, 1847, the auditor made his final report. He assumes, upon the testimony of *Mary Ann McPherson*, that up to the year 1835, the complainant had received a full equivalent for his support; next, by bringing her testimony which estimates the value of those advantages at $250 to $300, with that of *Middleton*, who estimates them at $80 or $90, and with that of *Cæsar A. Gantt*, who estimates them at $25, the average from 1835 to 1838, is adjusted at $126.66⅔ per annum, and from 1838 to 1845, at $182.50 per annum, and lastly, that the proper allowance to be made for complainant's support, would be $197.50 per annum; upon these principles, the sum ascertained to be due on the 1st of December, 1847, is $908.17.

The defendants excepted to this report on the grounds: 1st. That the testimony of *Mary Ann McPherson* ought not to have been brought into average with that of *Middleton* and *Gantt*, they testifying to different subjects. She proving that the advantages and privileges which complainant received from defendants, were worth $250 or $300. Whereas the latter testify only as to the value of the land complainant held of defendants. 2nd. That said testimony of *Miss McPherson*, standing alone, would show that nothing ought to be allowed to the complainant for his support. 3rd. That the allowance made him by the auditor, is excessive, and is not warranted by the testimony.

The complainant again excepted to the admissibility of all the evidence offered, for the purpose of showing that the complainant had been supported, in whole or in part, by the defendants; and also to the auditor's report: 1st. Because founded on such inadmissible testimony. 2nd. Because the auditor has given undue weight to the testimony of *Mary Ann McPherson*. 3rd. For the reasons stated in the exceptions to the former report.

The chancellor, by his decree, passed 10th of February, 1847, ratified the auditor's report, and directed the defendants to pay to the complainant the sum ascertained, by the auditor, to be due to him for arrears, and also the further sum of $197.50, in half yearly payments, commencing on the 1st December, 1847, and continuing during his life.

Both the defendants and the complainant appealed from this decree.

The cause was argued before Dorsey, C. J., Chambers, Magruder, Martin, and Frick, J.

Pratt and Alexander, for complainant, insisted:

1st. That the decree of the Court of Appeals, already passed on the former appeal, and which gives law to this case, entitles him to recover an adequate allowance for his subsistence, from the time of the death of *Francis Tolson*, the testator, to the time of the final decree to be passed in this cause, subject only to a deduction therefrom to amount of $60 per year, from the time of the testator's death, to the time of filing the bill, and that, under said decree, evidence is admissible only for the purpose of showing what would be an adequate allowance for subsistence, irrespective of any payments or allowances which may have been made to the complainant.

2nd. That as said decree directs that, in making the allowance to the complainant, due regard is to be had to his condition and habits in life, it is concluded that the allowance must have respect to the fact, that he is, and was, at the time of the

testator's death, a father of a young family, dependent on him for subsistence.

3rd. That if evidence is admissible for the purpose of showing that the complainant was subsisted for any time, entirely or in part, to a greater extent or value than is admitted by the bill, the deductions made from the testimony in the record, by the auditor, are erroneous; and on this point he will especially insist, that the testimony of *Mary Ann McPherson* ought to have been excluded, because of its extravagance.

4th. That the aforesaid decree of this court has established, that the subsistence to be provided for the complainant, is charged upon all the real estate of the testator *in solido*. The chancellor ought, therefore, to have passed a formal decree, expressly declaring, that said real estate is chargeable with the arrears now due the complainant, and the further sums which may become due, and ought to have provided for a sale of said lands, or for an application of the rents and profits thereof to the payment of the sums due, and to become due to the complainant.

Tuck and Randall, for defendants, contended:

That the decree of the chancellor was erroneous, so far as it overruled their exceptions to the auditor's account, which they insist were well taken, and which constitute their points as appellants.

2nd. As appellees, the defendants insist, that the order of the chancellor, of the 10th of February, 1848, was correct in overruling the exception of the complainant to the auditor's account.

Chambers, J., delivered the opinion of this court.

The argument in this case has proceeded chiefly on the ground, that the decree heretofore made by this court was of a conclusive character, not only in regard to the general question of complainant's right to recover, but as to the details and amount to be allowed him, and the particular rules by which the auditor was to be controled. In short, that the defendants

in the bill were thereby precluded from making any defence upon the merits. It is obvious, that if such a construction be given to our former decree, as to deprive the defendants of the privilege of showing, that the requisitions of the will have been in whole or in part complied with, and to enforce a contribution for the complainant's support, when they have in fact previously made that contribution, injustice must be done.

As this court would most unwillingly occasion such injustice, so will it exert every legitimate authority to prevent its infliction. We are quite willing to admit, that the language of our former decree might and should have been more carefully considered, but we think a fair interpretation of it will not preclude the just claims of the defendants to make a full defence upon the merits. The bill was filed upon the hypothesis, that by the legal effect of the will, *John Tolson* and *John Tolson's* family, were entitled to a maintenance out of the estate of the testator. The defendants assumed the theory, that the bequest was altogether void, so that it conveyed no interest to *John Tolson* or to his family. To avoid the labor, time and expense of ascertaining whether the devisees of the testator had complied with the terms of the bequest, as construed by the complainant, an agreement was filed to the effect, that for this purpose—that is to try the rights of complainant in the most summary way—a demurrer to the bill should be filed. This brought the general question of the effect of the bequest before the late chancellor, who decreed, that the bequest was void for uncertainty. Upon an appeal to this court, that decree was reversed, this court being of opinion, that so far as a maintenance to *John* was directed by the will, it was sufficiently certain, but that as to the family, it was void. The object of the agreement was then gratified, and the parties became informed of their rights under the will. It was not competent in this court to allow the defendants to withdraw their demurrer and answer over, although provision for doing so in the court below might have been made in the decree. The decree given by this court was, in its terms, calculated to afford the relief to which the allegations of the bill entitled the com-

plainant, those allegations being in the posture of the case as it then stood admitted by the demurrer, and although it would have been more regular to have ordered the case to be returned to the chancery court, with the privilege to the defendants to answer to the merits, if they chose to avail themselves of their privilege to do so, yet it does not follow, that such right was taken away by any thing in our decree. Upon the question, whether that right might be exercised after the case was again in the possession of the chancellor, the decree is silent, and for that reason, is within the case of *Duvall and The Farmers Bank*, 9 *G. & J.*, 32, in which it was held, "that upon a second appeal in the same case, this court may look into and decide questions involved in the record previously brought up, when a decision of those questions was not made upon the former appeal." We think, therefore, that the chancellor was in error by the order of 1st May, 1839, rejecting the petition which the defendants preferred, asking leave to answer fully upon the merits; and also by the order of 9th July, 1842, ruling the exceptions to the answer good, on the ground that the defendants were not at liberty to answer to the merits of the case stated in the original bill.

The decree of this court was express on the point, that a maintenance to *John Tolson*, as an individual, was secured by the will, and the reference to the "condition and habits of life" of *John Tolson* and his late father, was intended to have allusion to the extent of the estate and to their mode of living, so far as its expensiveness or economy were concerned, and the practice and habits, in this respect, of the persons with whom they associated. It will readily occur, that where a man of very large fortune, whose habits of life have been luxurious, and who has indulged his children in the most expensive style of dress, and other items of habitual gratification, provides for the maintenance of a child, whose misfortunes or infirmities of character make him unfit to be trusted with the possession of a distributive portion of his estate, a larger annual expenditure would be proper and, indeed, necessary to his comfort, than in a case differing in all respects, so far as wealth,

and luxurious or expensive habits of living were concerned. A man may be comfortable, with plain fare and plain dress, who has always been accustomed to them, while to another, who has always indulged in a contrary practice, and whose associations are with those of similar habits of indulgence, it would be anything but comfort to be reduced to the same kind of economy. The terms were employed in the decree in the sense here expressed, and not as denoting his condition relatively to his wife and children, and servants; and the extent or value of the estate of the testator, was considered a proper element in the estimate of a reasonable allowance, as it cannot be inferred, that with a family of seven other sons and two daughters, it was his design to give the whole, or a very large proportion, of the profits of his entire estate to the maintenance of one son, to whom he did not deem it prudent to devise any portion of his estate.

The opinion of the present chancellor, as expressed in his order of the 14th June, 1847, gives a very proper interpretation to the decree of this court, except in the particulars about to be mentioned. The first is, that he allows the testimony which had been given, as to the sum necessary for the maintenance of the complainant, regarded as "the head of a family," to enter into the average with the estimates of what was necessary for his individual support; and, again, he seems to consider the decree of this court as requiring the charge to be made *in solido*, and not distributively amongst the several defendants. The court did not design, by saying the entire real estate was chargeable, to confine the chancellor to any particular mode of securing to the complainant the benefit of the lien, but only to announce the opinion that a lien was created. Being of opinion with the chancellor, that there are manifest advantages in adjusting the rights of all the parties definitely, there appears to us great propriety in arranging the account accordingly. By the terms of the act of Assembly, we are bound, while the case is before us, to correct any errors throughout the progress of the cause which are complained of on the appeal, and we must, therefore, reverse the several orders before mentioned,

and allow the case to be returned to the chancery court, to permit the defendants, if they find it necessary to do so, to answer fully to the bill, on such terms as the chancellor, pursuant to the practice of the court, may prescribe, and for such further proceedings as the nature of the case and justice to the respective parties may require.

As some points of detail have been argued, it may avoid future litigation on them to say, that we are of opinion, that the complainant's portion of the land derived to him by inheritance from *Wihelmina Tolson*, is chargeable, as every part of the real estate is, with its proportionate share of the allowance, and we think the most effectual mode of imposing the charge, would be by crediting this aliquot part against his claim, and thus reducing the amount chargeable to the owners of the other portions.

Martha E. Tolson, the widow of *Alfred*, can only be chargeable in respect of her dower, and her child only as heir to the father, *Alfred Tolson.*

Interest is properly chargeable at the expiration of the year, if any balance then remains due, according to the principle, in that respect, adopted by the account, which was confirmed by the chancellor.

CAUSE REMANDED
UNDER ACT OF 1832.

RICHARD BARNES, AND ROBERT FERGUSSON, EXC'RS OF JOHN BARNES, *vs.* PETER W. CRAIN, AND HENRY G. S. KEY, ADM'RS OF MARY C. B. COMPTON, AND NEXT FRIEND OF BARNES COMPTON.—*December*, 1849.

The jurisdiction of courts of equity to superintend the administration of assets, and decree distribution among legatees, is now fully established.

Every guardian, however appointed, is under the superintendance and control

of a court of chancery, and may be there held responsible for his conduct, upon application of the infant by *prochein ami*.

A bill in equity may be filed during infancy, and the court will hear any one on behalf of the infant.

A bill filed by the representatives of a ward, against the executors of a guardian, in whose hands the estate of the infant remained unaccounted for at his death, is clearly within the jurisdiction of chancery.

The intervention of a remedy at common law, against the representatives of the guardian, cannot be made to control the original relief which chancery had the power to afford.

Where the authority and jurisdiction of the court of chancery is original and established, it is not ousted by a statutory provision, giving to courts of law power over the same subject.

Chancery will entertain a bill which, on its face, discloses a complete remedy at law, where sufficient ground is shown for going into equity.

As evidence of payment of a legacy due to a ward, the defendants relied on a memorandum in the handwriting of *C*, the husband of the ward, by which he charged himself with "amount of *B's* draft, 500," (*B* being the guardian.) The draft was not produced, and there was no proof of its payment, or on what account it was drawn. They further claimed a credit of $15,000, being the amount of a check by *B*, on a bank in *Baltimore*, payable to *C*, *or bearer*, which was paid by the bank, but to whom the money was paid, did not appear. HELD: that this evidence of payment was too indefinite and vague to entitle the guardian to a discharge in equity.

When payments of this character, looking to the discharge of a guardian's account, are made, it is essential that the party, at his peril, should obtain and preserve the necessary and legal evidence to that effect.

Appeal from the *Court of Chancery*.

The bill in this case was filed in 1845, by the appellees, to recover of the appellants a pecuniary legacy bequeathed, in 1818, by *Samuel Bond* to *Mary C. B. Compton*, and which came to the hands of *John Barnes*, the executor of *Samuel Bond*, and the testator of the appellants.

The answer admits, the bequest by *Samuel Bond* to his grandniece, *Mary C. B. Barnes;* the reception of the legacy by *John Barnes*, the executor of *S. Bond*, and the guardian of *Mary C. B. Barnes;* the marriage of *M. C. B. Barnes* to *Mr. Compton*, in 1824; her death in 1834, and that of her husband, in 1837, leaving the complainant, *Barnes Compton*, their only child and heir at law. The answer also admits the

administration of the complainants *Key* and *Crain*, upon the estate of *Mrs. Compton*, and the sufficiency of the personal estate of *John Barnes*, in their hands, as executors to pay the legacy. The defence set up is, that the legacy had been paid. The defendants also excepted to the averments of the bill, and the jurisdiction of the court.

The facts of the cause are so fully stated in the opinion, as to render a further statement of them, or of the testimony, unnecessary.

The chancellor (JOHNSON,) decided, that the complainants were entitled to relief, and passed an order referring the cause to the auditor, to state the necessary accounts. From this order the defendants appealed. The opinion of the chancellor, accompanying this order, is reported in 1*st Md. Ch. Decisions*, 151.

The cause was argued before DORSEY, C. J., CHAMBERS, MAGRUDER, MARTIN, and FRICK, J.

RANDALL and CAUSIN, for the appellants, on the questions of lapse of time and jurisdiction:

The court see, that this is a bill for the recovery of a legacy twenty-seven years after the testator bequeathed it, and died—twenty years after the right of action accrued to the legatee, by her intermarriage, or more, as it may be her right of action accrued before her marriage—during ten years of which twenty, she was living with her husband, and during three years longer the husband lived, surviving his wife. The bill alleges no absence from the State, no disability to sue, no ignorance of rights, nothing to arrest this right of action, or prevent recovery.

As to the jurisdiction of the court, which is excepted to, there can be no doubt of the right of action for the recovery of this legacy on the executor's bond, nor on the guardians bond—which could have been brought by the legatee and her husband, or by her surviving husband, for twelve years after their intermarriage, at least—for seven years after the passage of this account, wherein *John Barnes* had claimed credit for these lega

cies. No account was required, no difficulty whatever requiring the aid of a court of chancery, no special circumstance, whatever, shown why the parties should go into equity. We say, therefore, there is no jurisdiction in this case in a court of equity; a court of law would have fully administered relief, else all estates may be brought here. 2 *G. & J.*, 14, *Gibbs vs. Clagett.* 12 *G. & J.*, 477, *Richardson vs. Stillinger.*

Our testamentary system, and acts of Assembly, giving the right to sue and recover legacies at law, causes much of the *English* law on the subject, to be inapplicable to us. *Kane vs. Bloodgood*, 7 *John. Ch. Rep.*, 90.

If a suit had been brought at law, on either the executor's bond, or the guardian's bond, no doubt can be entertained that, by our statute, it would have been barred by the statute of limitations. 3 *G. & J.*, 389, *Green vs. Johnson.*

Whether the suit had been for the legacy or not, and whatever proceedings had been instituted at law, for the recovery of this legacy, it would have been barred by the statute of limitations. As there are forms of action at law, by which this action for the legacy may be maintained, equity will follow the law in applying the same rule when the suit is brought here, although there be no such special limitation provided by law, within which the legacy must be sued for. 7 *John. Ch. Rep.*, 90, above.

Now this very fact, that there is no such special provision to bar a legacy, shows, that courts will adopt some such rule as will prevent the laches, lapse of time, &c., as may require the proper prosecution of suits to recover legacies. This is the general policy of the law. The testamentary system, in all its provisions, looks to a speedy and certain settlement up of estates. Here, from 1819, to 1837, the right to recover, existed in persons capable of suing and requiring payment. Now, although there is no special limitation of time, within which a legacy must be sued for, yet, in *Angel on Limitations*, *page* 169, we read: "Long forbearance to make demand for unpaid legacies, affords the presumption, either that the claimant was conscious the legacy has been satisfied, or that he intended to

relinquish it;" and he cites, among the authorities, *English* and *American* works. See also *Jones vs. Turburville*, 2 *Vesey, Jr.*, 11. 2 *Story Eq. Com.*, *sec.* 1520. 1 *Minor*, 256, 362, *Huckstep vs. Matthews and Court.* 2 *Watts' Rep.*, 161.

That courts of equity will always presume against these stale demands, under all circumstances. 10 *Wheat. Rep.*, 152, *Elmundorff vs. Taylor.* 1 *Howard*, 161, *McNight vs. Taylor.* 5 *G. & J.*, 121, *Steiger's Adm'r, vs. Hillen*, (this is a case of a widow, always the most favored of claimants.) 3 *Bland*, 110, *Hepburn's case.*

There needs be no such defence as laches, lapse of time, &c., specially set up in the answer, the plea or defence of payment is supported by these facts, showing the legal and equitable presumption of payment. *Higgins vs. Crawford*, 2 *Vesey, Jr.*, 11, and the above authorities.

The argument on the facts of the case is omitted.

Alexander and Pratt, for the appellees, insisted:

1st. That the record does not show the payment of the whole, or any part of the legacy claimed in the bill.

2nd. That the prayer for relief, contained in the bill, was sufficient to warrant the decree which has been passed in the case.

3rd. That the case presented by the bill, if sustained by the proof, would clearly entitle the complainant to relief *in equity.*

Frick, J., delivered the opinion of this court.

Samuel Bond, by his last will and testament, bequeathed to his grandniece, *Mary C. B. Barnes*, a pecuniary legacy of $3,000, and also one-fourth of his slaves. Two of the co-executors of the will having died, *John Barnes*, the surviving executor, (and the father and guardian of the legatee,) passed his first and final administration account with the orphans court, by which, as guardian, he came to the possession of the said $3,000, and the further sum of $2,337.50, the estimated value of the slaves so bequeathed to his daughter.

Mary C. B. Barnes intermarried with *William P. Compton*, and both *Compton* and wife afterwards died, leaving *Barnes Compton* (one of the complainants,) their only child and heir at law, and *John Barnes*, the grandfather, was duly appointed his guardian.

The said *John Barnes*, the guardian, some few years after, also died, leaving the defendants, *Richard Barnes* and *Robert Fergusson*, his executors, who, in that character, came to the possession of his estate.

Peter W. Crain and *Henry G. S. Key*, the complainants, then sued out letters of administration upon the estate of *Mary C. B. Compton*, and, in that right, uniting with them *Barnes Compton*, (for whom they sue as his next friends,) they file the present bill of complaint.

The bill admits, that *Barnes*, the guardian, accounted to *Compton* and wife for her proportion of the estimated value of the slaves, but charges that he never paid to them, in whole or in part, the legacy of $3,000, which is now sought to be recovered by these complainants.

The bill further charges, that as the next friends of *Barnes Compton*, the complainants, *Crain* and *Key*, applied to the defendants to pay the aforesaid legacy, but that they refused to do so, because of their doubt whether the same could be accounted for and paid over to any other than an administrator of the said *Mary C. B. Compton;* and that they, thereupon, sued out letters of administration on her estate, to secure the defendants, and afford them the necessary indemnity against future responsibility for any sum which they may be decreed to pay, either to *Barnes Compton*, the minor, or to them, as administrators of the mother, *Mary C. B. Compton.*

The bill charges, also, that in a certain book of account, or memorandum, in the possession of said executors of *Barnes*, the entries importing the indebtedness of their testator, will be found, intended by him as the evidence and acknowledgment of his continued liability for said legacy, in the event of his death, and concludes with a prayer for such relief as equity may require.

The answer admitting the bequest by *Samuel Bond*, the grandfather, the marriage and successive deaths stated in the bill, the birth and minority of *Barnes Compton*, and the sufficiency of the estate of the testator, referring to the book of accounts invoked in the bill, (which is produced as a part of the evidence,) and to other testimony to be produced by them, avers that the legacy has been paid, if not the whole, at least in part, to *Compton*, the husband of the legatee, in his lifetime, and insists, that no such relief ought to be granted, as is prayed by the bill.

Before we enquire whether this defence is sustained by the testimony submitted, we proceed first to dispose of the objections which have been taken to the form and character of the proceeding.

It has been contended, that there is no jurisdiction in this case in a court of equity, and that full relief might be administered at law.

It is ordinarily true, as a general proposition, that where there is effectual and complete remedy at law, and no ground is shown for going into equity, a court of chancery will not entertain a bill. 1 *H. & G.*, 221, *Drury vs. Conner*. But one of the most important functions of a court of chancery, is the care of the rights and the property of infants, and the jurisdiction of these courts to superintend the administration of assets, and decree distribution among legatees and distributees, is now fully established. 1 *Story's Eq.*, *sec.* 502. Every guardian, however appointed, is under the superintendance and control of the court of chancery, and may be there held responsible for his conduct, upon application of the infant by *prochein ami*. 1 *John. Ch. Cas.*, 99, and 2 *P. Wms.*, 107, *Eyre vs. The Countess of Shaftsbury*. And a bill in equity may be filed during the infancy, and the court will hear any one on behalf of the infant. *Macpherson on Infants*, 115, 318.

In this character, these parties, *Crain* and *Key*, as the next friends of the ward, first applied to the appellants to account for said legacy; and the payment being declined, on the ground that, in that character, they could not indemnify the executors

of *Barnes*, they sued out these letters of administration, as a sufficient security to the appellants, in accounting for and paying to them, in that character, the legacy due by their testator, and which, when recovered, *Barnes Compton*, the ward, will be entitled to receive from their hands.

It is thus a bill filed by the representatives of the ward, against the executors of a guardian, in whose hands the estate of the infant remained unaccounted for at his death. It claims the liquidation of an account over which the court of chancery, in the lifetime of *Barnes*, had original jurisdiction, and full power to afford redress. The intervention of a remedy at common law, against the representatives of *Barnes*, since his decease, cannot be made to control the original relief which chancery had the power to afford; and the case is still essentially that of a ward seeking relief in chancery, against the perversion of a trust in the hands of the guardian, for which his estate is responsible.

The argument of the appellants' counsel is, that as the right of action at law, for the recovery of this legacy on the executor's bond, is complete and undoubted, and as our acts of Assembly give this right to sue and recover legacies at law, the resort to chancery is excluded. But where the authority and jurisdiction of the court of chancery is original and established, it does not result that such jurisdiction is ousted by a statutory provision that gives to courts of law power over the same subject. And the case of *Drury vs. Conner*, 1 *H. & G.*, 220, before referred to, shows distinctly, that chancery will entertain a bill which, on its face, discloses a complete remedy at law, where sufficient ground is shown for going into equity. And such grounds, we apprehend, are sufficiently shown by the facts in the case, which we propose to examine.

The material fact, that the legacy was bequeathed by *Samuel Bond* to his grandniece, the mother of *Barnes Compton*, is admitted by the answer, which further avers, that it was paid, if not in whole, at least in part, to *Wm. P. Compton*, the husband of the legatee, in his lifetime.

To sustain the defence thus set up, the appellants file the book of accounts invoked by the complainants, which is endorsed, "Book of accounts of *John Barnes*, surviving executor of *Samuel Bond*." It must be premised, here, that in the administration account of *Barnes*, as surviving executor, in the distribution of the estate accounted for, he charges himself with $3,000, the amount of specific legacy in his hands, as guardian of *Mary C. B. Barnes*, as also to one-fourth of the negroes of the deceased, bequeathed to her, in value $2,337.50.

That account, without date, is then transferred to this book, which purports to show the settlement of the estate, with the legatees and others, as follows:

Dr. John Barnes, to Mary C. B. Barnes.

To one-fourth of negroes, as per inventory, - - - -	$2,337 50
Specific legacy, - - - -	3,000 00
	$5,337 50

And on the other side, credited thus:

Cr. By your receipt, in full, - - $5,337 50

This charge is here made against himself, and in his character as guardian to the ward, *before her marriage*. Whose receipt in full is here meant and intended? Not *Compton's;* for *Mary C. B. Barnes* was not then married to him. But the answer avers, that the payment was made to *Compton* in his lifetime. This entry, therefore, can certainly not be used to support that allegation. To whom, then, was it paid? It is a forced construction, and also against the defence set up, to say it was paid to the ward. Besides, being an infant ward, she could give no discharge. But it is entirely consistent with the statement of the account, and the design of the book, to say it was paid to himself; that is, intended as a transfer, as administrator, to himself, to operate as a charge against himself, as guardian of his daughter. All the other entries in the book confirm this view. The entry preceding is:

"*Dr.* *Henry Gardiner's guardian, to Samuel B. Gardiner.*
To specific legacy to *Samuel B. Gardiner*, $3,000

Cr. (On the other side, as above.) By your receipt,
in full, - - - - - $3,000."

Thus shewing, that the account was liquidated by the receipt of the party against whom the entry and the charge is made, and corresponding with the credit which he claims in the distribution account of the estate in the orphans court, where this same amount is claimed and credited to the estate, as paid in distribution to "*Henry Gardiner*, guardian of *Samuel Bond Gardiner*, for a specific legacy of $3,000;" this book of accounts being a recapitulation, *seriatim*, of the distribution, and a reiteration only of the payment of this amount from him, as executor to *himself* as guardian, particularly as it is nowhere averred or claimed, that he paid the amount to his daughter, but, on the contrary, that he paid it to her husband, *William Compton*. And it will be observed, that the account does not purport to be any other than an account with himself, in which *John Barnes*, as guardian of his daughter, gives to *John Barnes*, the executor of *Samuel Bond*, a discharge, and takes to himself, as such, a receipt in full, or, in other words, a credit for the amount. This is the only interpretation to be given to the entry as it stands, and corroborates the charge of the appellees, that the proof of their claim would be sustained by the entries in this book, when produced. It does not satisfy us of the defence for which it is used. The law has defined, with peculiar strictness, the mode of discharging a guardian's account. We do not say it precludes the proof of a settlement *aliunde*, but it must be on clearer evidence than we think this account of the party himself furnishes, and we, of course, reject it.

The next evidence produced is a separate paper, no part of the account book, which purports to be the charges of the commissioner and clerk, for executing the commission in the cause, and upon the same paper, immediately following, is an account, thus stated: "*Wm. P. Compton*, exc'r, dr." "To one negro

man *John*, $362,50." And then follow some other small items, and it closes thus: "1829, by amount of *John Barnes'* draft, $500." This latter account is proved to be in the handwriting of *Compton*, and, by the testimony of *Cox*, must have relation to this sale of a negro. All that he says is, that "the exhibit is in his handwriting, as far as the entry of the charge in said account of negro man *John*, and that he has no distinct recollection about the balance of said account." And on looking at the account again, says, "he had negroes of *H. Hawkins* for sale, and, among them, one called *John*, and thinks the transaction must have taken place as there stated." Whether the draft was drawn *by John* or *on John Barnes*, does not appear. Whether on account of the legacy or not, is equally uncertain, as also the particular date of the transaction, which is covered by the whole year of 1829. *Barnes*, as we have seen, kept a book of account of his administration of the estate, and there is no entry there of this transaction. The record shows, that there were other claims of *Mrs. Compton* against the estate, and, even if it were shown that the draft was upon *Barnes*, and that he accepted it, it cannot still be assumed, that it was specifically on account of this legacy. The draft is not produced, nor is there any evidence that it was ever paid; and the transaction to which the account refers, seems to have been exclusively between *Compton* and *Cox*, and not *Compton* and *Barnes*. In any view we can take of it, with the aid of the oral testimony, it is altogether too uncertain to make it the basis here of a credit upon a guardian's account. Transactions between guardian and ward, should be made more lucid than this, to entitle the guardian to a discharge in equity. It may have been a payment, as contended for by the respondents, but when the evidence is committed to a loose piece of paper, it should, at least, appear in a more intelligible form, and susceptible of a clear interpretation. It would be to relax the rules of evidence too far, to allow evidence of this character to avail the party setting it up, and it is, of course, rejected here.

Of the same character is the other credit claimed, upon the

check of $1,500, in favor of *Wm. B. Compton*, or bearer, on the *Bank of Baltimore*. It is true, that the payment of it is proved at the bank out of the funds of *Barnes*. But *Compton* is no further identified with the transaction, than by the direction in the check to pay it to him or to bearer. Not the slightest intimation that *Compton* ever received the money, but what we are left to infer from the terms of the check. It is not even proved that the check ever came to the hands of *Compton*. Evidence of this character, so indefinite and vague, the courts of this State have so uniformly denounced, that we cannot for a moment hesitate to reject it. We can only pursue the principles long established in courts of justice in the application of this sort of evidence. It may be probable that this check was paid according to its tenor, but we are not at liberty to infer it. And if paid to *Compton*, whatever evil it works, is solely imputable to the party who is injured by his own laches.

The remaining evidence relied on, is still more exceptionable. *Compton*, it is said, at one time expressed to the witness a desire to buy lands, *if Barnes would settle with him*. He did purchase, about that time, land to the amount of $780. Without the slightest proof of his inability to purchase, independent of this supply from *Barnes*, we are asked, in effect, to credit this amount as money received from *Barnes*, and to apply it in payment, *pro tanto*, of the legacy. Such a conclusion from this vague declaration of a party, would do violence to the wildest possible presumption, and cannot for a moment be entertained by the court.

Upon a fair and liberal interpretation of this testimony, we can find no satisfactory proof of the payment alleged, either in whole or in part, of this legacy, from *Bond* to *Mrs. Compton*, or to her husband. It is not so reliable in any particular, as to justify the court in attaching to it the slightest attribute of certainty in its application to the case before us. There is evidence of transactions between *Barnes* and *Compton* in relation to moneys. But that they relate to this particular controversy, or sustain the construction claimed for them, is far from

being conclusive. When payments of this character, looking to the discharge of a guardian's account, are made, it is essential that the party, at his peril, should obtain and preserve the necessary and legal evidence to that effect, and however plausible the inferences may be from the transactions here set up between the parties, to allow them to prevail as conclusive against the complainant, would fix upon the administration of justice a character of instability and uncertainty, which it is the great object of the rules of evidence to avoid.

There is in the whole case no legal proof of any of the alleged payments. They rest upon testimony too weak to justify the conclusions claimed for it. And if they do, in reality, belong to the particular matter under inquiry, the payment of this legacy, it is the fault or misfortune of *Barnes*, that he has not left the key to their application. The neglect is his own, and whatever injury may result to his estate, (upon the hypothesis that it may have been paid,) is entirely to be imputed to his own want of ordinary prudence and caution. We can have no hesitation in affirming the decree of the chancellor.

DECREE AFFIRMED.

LUCY GRAY, AND OTHERS, *vs.* EDMUND LYNCH AND SAMUEL MCDONALD, AND OTHERS.—*December*, 1849.

The *English* chancery rule, in regard to the securities in which trust funds must be invested, has never been literally nor analogically extended to *Maryland*.

In this State trustees, holding funds directed to be invested in stocks, have always been in the habit of making such investments in *bank stock*, and if such usage had never before existed, its commencement would have been analogically justified by the 4th and 5th sections of the act of 1831, ch. 315, empowering the orphans courts, in their discretion, to order executors,

administrators and guardians to invest trust funds, in their hands in *bank stock*.

A testator devised to three trustees, *by name*, certain property in trust, to sell and convert it into money, and invest the proceeds in "*some safe and profitable stock*," which they were to hold in trust, for the sole and separate use of the testator's two daughters. HELD: that this was a power coupled with an interest or trust, which, upon the death of one, could be executed by the surviving trustees.

A mere naked power to sell, not coupled with an interest, does not survive, but when the power is coupled with an interest, it may be executed by the survivor, and it is the possession of the legal estate, or a right in the subject over which the power is to be exercised, which makes the interest in question.

Where a power *per se*, is merely naked, yet if, in other parts of the will, there are trusts and duties imposed, which require a sale to effectuate the intent of the testator, the power survives.

As co-trustees have an authority coupled with an interest, their office survives.

The act of 1822, ch. 162, abolishing estates in joint tenancy, does not apply, and was never intended to apply to devises or grants made to trustees, for the benefit of third persons.

Where trustees were directed, by the will, to invest money in stock, and hold the same in trust for certain purposes, after an investment was once made, if the money should be returned to them without default on their part, they would have the power, and would be bound to provide for its re-investment.

Where the trustee, without application to the court, does an act which, upon application, would have been ordered, and was, at the time it was done, obviously for the benefit of all concerned, his act will be ratified and affirmed, and held of the same validity as if previously ordered by the chancellor.

The direction, to invest in "some safe and profitable stock," does not restrict the discretion of the trustees, and limit them in their selection to stocks already existing; they could subscribe for stocks about to be created.

The trustees had invested a portion of the trust fund in the stock of the old *Bank of the United States*, and when its charter was about to expire, they, with all the other non-resident stockholders, executed a power of attorney, authorising *N B* to act for them, in relation to an application for a charter to any State legislature, and the acceptance thereof. Application was accordingly made, and the charter granted by *Pennyslvania* was accepted by all the stockholders of the old bank, except the *United States*, and the shares of all the stockholders so applying, were afterwards changed to an equal number in the new bank, by *N B*, all whose acts, so far as they were concerned, the trustees ratified and confirmed. HELD:

That these proceedings did not constitute a breach of trust on the part of

these trustees, and they were not responsible for the loss subsequently arising to the trust fund, from the failure of the new bank.

A trustee is not chargeable with more than he has received, unless there is evidence of very gross negligence, amounting to wilful default.

Where trust moneys are once properly invested in stock, the trustees cannot, without express authority, dispose of the stock, and invest it in other securities.

Where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for losses accruing in the management of the trust property.

Appeal from the *Court of Chancery.*

Benjamin Fergusson died in 1828, leaving a last will and testament, by which he devised and bequeathed all his property to *James Campbell, Edmund Lynch, and Samuel McDonald,* whom he appointed his executors, in trust, to sell and convert it into money, except certain specified portions, and then provided as follows:

"And it is my will and desire, that when all my property, not heretofore otherwise disposed of, is sold, and the proceeds received by my said trustees, that *they shall invest the same in some safe and profitable stock*, and shall also invest all money which I may have on hand, and all that may become due to me or my estate, from notes and debts, (first, however, paying all just debts, &c.,) in *the same manner*. And it is my will and desire, that the said stock shall be held, in trust, by the said *James Campbell*, and *Edmund Lynch*, and *Samuel McDonald*, for the sole and separate use of my two daughters, *Mary Owen*, and *Ann Gray*, during their natural lives, free from all control of their husbands, and, at the death of either of them, her moiety for the use of her children, equally, and their heirs, forever."

The three trustees and executors qualified and acted together in the discharge of the trusts and duties imposed upon them by the will, until April, 1832, when *Campbell* died. The two surviving trustees, from that time, continued to discharge the trusts of their office.

On the 2nd of June, 1845, the appellants, *Mary Owen* and her children, and the children of *Ann Gray*, (who died in June, 1844,) filed their bill against *Lynch* and *McDonald*, the surviving trustees, for an account of the trust. It charges an illegal conversion and misapplication of testator's interest in the *Union Line of Steamboats*, but as this part of the case was fully settled and arranged, *pendente lite*, no questions arise in reference to it. It then charges, that after all debts, &c., had been paid, there remained, in the hands of the three trustees named in the will, the sum of $104,000, exclusive of the interest in said line of steamboats, and that complainants are entitled to have a full and strict account of the same, and all interest and dividends thereon, or which ought to have accrued therefrom. It then charges, that the children of *Ann Gray*, deceased, are entitled to have one moiety of all said trust, moneys, &c., to their own use, discharged of the trust. It then sets forth the death of *Campbell*, and prays that the surviving trustees may render a full account of their trusts, and particularly in what stocks they invested said moneys, the date, amount, and value of such investments, and the dividends arising thereon, &c., that an account may be taken, and the will executed, and the balance that may be found due complainants, may be paid to them by said surviving trustees, and by *Robert Thompson*, the administrator of *Campbell*, who is made a defendant. The bill also makes *William Owen*, the husband of *Mary Owen*, a defendant, and prays general relief.

The answer of *Lynch and McDonald*, gives a full explanation of all their transactions relating to their trust, but only that part of it is material to this case, which relates to certain investments in stocks of the *Bank of the United States*, and the statements in relation to which, are admitted to be true. This part of the answer admits the investment by the three trustees in July, August, and October, 1829, of $28,088.25, of the trust estate in stock of the *Bank of the United States*, and avers, that they paid over the dividends to *Mrs. Owen* and *Mrs. Gray*, the *cestuis que trusts* for life, and that said investment continued unaltered until the charter of said bank expired,

and was always deemed, by these defendants, and others interested, as a safe and profitable investment.

"That when the charter of said bank was about to expire, the stockholders therein being unable to obtain a renewal of their charter from the Congress of the *United States*, applied to the legislature of *Pennsylvania* for a charter to enable them to continue the business, which charter was granted, and in the winding up of the business of the old bank, most, if not all of the stockholders of the said *Bank of the United States*, agreed to take stock in the new incorporation thus chartered, by the name of *The President, Directors and Company of the Bank of the United States*, it being the general opinion of the commercial community, as well as of others, that said new bank would be equally safe and productive as the preceding one, whose charter was just expiring. And these defendants being desirous to discharge their duty in said trust, and believing firmly that it would be for the interest of said trust estate, to invest in the said new bank the amount which had previously been invested in the *Bank of the United States*, chartered by Congress, consulted with various persons, in whose judgment they had confidence, as to the propriety of so doing, and found that every one with whom they or either of them consulted, thought the investment would be safe and profitable. That after making these inquiries, these defendants being satisfied that such investment in the new bank, chartered as aforesaid, would be both safe and profitable, did make said investment by exchanging, in the early part of 1836, the two hundred and twenty-one shares of the stock of the *Bank of the United States*, so as aforesaid before that time held by them, for other two hundred and twenty-one shares of the new *Bank of the United States*, chartered as aforesaid, as was done by most, if not all of the other stockholders of said old *Bank of the United States*. And these defendants aver, that said *William Owen*, and *Mary Owen*, his wife, and *Ann Gray*, were fully aware of said change and investment having been made, and never at any time (until after the failure of said new bank,) in any way objected thereto; but, on the contrary, as these defendants

have reason to believe, and always did believe, they, and all others interested in said trust estate, fully approved thereof. And these defendants state, that after said exchange or investment, the said new *Bank of the United States* went on regularly, making dividends semi-annually, at the rate of eight per cent. per annum, (being one per cent., per annum, more than the old *Bank of the United States* paid,) and having fully the public confidence, so much so that the stock of said new bank was and continued considerably above par. And these defendants went on regularly receiving said semi-annual dividends up to and inclusive of the dividend in July, 1839, which was still at the rate of eight per cent. per annum, which dividends from said new bank so received, amounted, in the whole, to $6,188; and, as they received the said dividends, these defendants paid the same over to said *Mrs. Mary Owen* and *Mrs. Ann Gray*, who were entitled thereto, under the said will, and who never did, nor did any other person interested in said trust estate, at any time up to said July, 1839, make any objection to said investment, but, so far as these defendants knew, or had reason to believe, and did believe, entirely approved thereof. And these defendants say, that after said dividend of July, 1839, the said bank made no further dividend, but, for a long time, it was the general opinion, and the opinion of these defendants, that said bank was perfectly solvent, and would again go on to make dividends, as before, and, therefore, these defendants did not sell or dispose of said stock, which could only have been done at a great loss, and these defendants, as trustees as aforesaid, still hold the said stock as part of said trust estate. And this defendant, *Samuel McDonald*, answering for himself, states, that he and his father, the late *William McDonald*, were the owners of four hundred and ten shares of the *Bank of the United States*, aforesaid, chartered by Congress, for some time before the expiration of its charter and at that time, and that they exchanged their said four hundred and ten shares for four hundred and ten shares of the said new *Bank of the United States*, in the same manner and on the same terms as these defendants exchanged the aforesaid two hundred and

twenty-one shares so held by them, in trust; and that he, the said *Samuel McDonald*, and his father continued to hold the same, and have never disposed of any part thereof, always believing, until it was too late, that the said investment of their own means (amounting to about $47,150, at the estimated value of the stock at the time of the transfer,) was both safe and profitable. And these defendants aver, solemnly, that they, at the time of making the said original investments in the *Bank of the United States*, chartered by Congress, and at the time of exchanging the same for the said shares of stock of the said *Bank of the United States*, chartered by the State of *Pennsylvania*, believed the said investments, and each of them, to be safe and profitable investments, and as safe and profitable as any other that they could have invested in, and that they acted, in so doing, with entire good faith, and to the best of their respective and united skill and judgment, and as they would have done if the said stock, or the money invested therein, had belonged to themselves, and as, in fact, this defendant, *Samuel McDonald*, did act with his own stock, as above stated, to a much larger amount."

It was admitted and agreed, by an agreement filed in October, 1846, that the facts stated in the above portion of the answer are true, save, only, that the remainder men under the trust, did not expressly approve of said investment; some of them knew of it, and neither objected nor assented, while others knew nothing of it. By the same agreement, it was also admitted, that the market value of the stock in said bank, as chartered by Congress, was, on the 2nd of February, 1836, $113.50, and the value of the stock of said bank, as chartered by *Pennsylvania*, was, on 2nd of February, 1836, $125.50; March, $125.75; April, $121; May, $121; June, $125.50; July, $127.50; August, $125.62½; September, $121.50; October, $119.25; November, $110; December, $115.50; July 2nd, 1839, $111.

At March term, 1845, another agreement was filed, by which it was agreed and admitted, that in making the original investment of $27,088.25, in the stock of the *Bank of the United*

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States, chartered by Congress, the trustees acted *bona fide* and judiciously, the stock in said corporation being in good credit. Also, that some time in February, 1836, shortly before the expiration of the charter of said bank, said *Lynch* and *McDonald*, as surviving executors and trustees, executed and delivered to *Nicholas Biddle* the following power of attorney, being similar to that executed by most, if not all, of the non-resident stockholders:

"Know all men by these presents, that we, *E. Lynch* and *S. McDonald*, surviving devisees, in trust, of the estate of *Benjamin Fergusson*, citizen of the *United States*, actually resident therein, the owner of two hundred and twenty-one shares in the capital stock of the *Bank of the United States*, and the owner of no other shares in the capital stock of said bank, do hereby constitute and appoint *Nicholas Biddle, Esq.*, *President*, attorney and agent for us, and in our name, as the owner of said specified shares in the capital stock of said bank, to vote as our proxy at any election of directors of said *Bank of the United States*, and on any question that may arise or be put at a stated or special meeting of the stockholders of said bank, according to the number of votes we should be entitled to vote, if then personally present, and especially for us, and in our name, to vote and act upon all and every question, matter and thing that may arise or be put at any stated or special meeting, touching or concerning the winding up of the affairs of the bank, the creation of any trust or trusts, the appointment of trustees, and whatever else may be needful; and also touching and concerning any application or applications for a charter or charters to any State or States, or the legislatures thereof, or touching or concerning the acceptance of any such charter or charters, and for us and in our name, to vote as our proxy at any election of directors under any such charter or charters so accepted, and for us to sign and to seal any instruments that may be deemed necessary, and generally to decide and to act for us as fully as we might or could do, if personally present; meaning and intending that this power shall be most liberally construed, and be as broad and extensive as we can give with

power also, an attorney or attorneys under him, for that purpose to make and substitute, and do all lawful acts for effecting the premises, hereby ratifying and confirming all that our said attorney, or his substitute, shall do therein, by virtue hereof, hereby revoking all former powers.

"In witness whereof, we have hereunto set our hands and seals, this ——— day of February, in the year of our Lord, 1836. EDMUND LYNCH, (Seal.)

"Sealed and delivered in the presence of, SAM'L MCDONALD, (Seal.)

W. L. GILL."

To this power was attached an affidavit, by said *Lynch* and *McDonald*, that they were owners of the shares referred to therein, and that no other power had been given to any person, which is now in force, to vote for them at any election.

That all the stockholders of the old *Bank of the United States*, except the *United States*, united in the application to the legislature of *Pennsylvania*, for the charter of the *Bank of the United States*, and that when the charter had been obtained, a general meeting of the stockholders of the old *Bank of the United States* was, after due notice, convened at *Philadelphia*, on 19th February, 1836, and that said charter was unanimously accepted by all said stockholders in said *National Bank*, except the *United States*, and the treasurer of the *United States;* and notice of said acceptance of the charter being given to the governor of *Pennsylvania*, the said new *Bank of the United States*, was immediately organised, and went into operation under that charter.

That in this application, and in accepting the charter, said *Biddle* voted in the names of defendants, under said power of attorney, as he did for all others, whose powers of attorney he held, as above stated. That on the 19th of February, 1836, when the market value of the stock was $129.25, said *Biddle*, acting under said power of attorney, transferred, on the books of said bank, chartered by Congress, said two hundred and twenty-one shares, and converted the same into an equal number of shares in the State bank. That no dividend was made on

said stock of the new bank, until July 1st, 1836, and that all the acts of said *Biddle* were afterwards ratified and adopted by the stockholders, who had constituted him their attorney, and by said *Lynch* and *McDonald*, so far as they affected said two hundred and twenty-one shares. This agreement also incorporates the charter of the new bank, and the statements made by said *Biddle*, at the general meeting of the stockholders, and the resolutions voted for by him thereat, which are not in the record. This agreement also incorporates a statement or table showing the market value of the stock of the new bank, at certain dates therein mentioned, covering a period of five years, and showing a fluctuating decline to almost nothing. The prices in this table are sufficiently set out in other parts of this statement, and in the opinion of this court.

The case was then referred to the auditor, who made a report, and stated accounts sustaining the answer of defendants, and the complainants filed exceptions, all of which were withdrawn, except those relating to the investments made in the stock of the *Bank of the United States*, the substance of which is, that the defendants ought to have been charged with the amount of money invested, and interest on the market value of said stock, at the time the trustees converted it into shares in the new bank.

One of the complainants having become insolvent, the bill was amended so as to make his permanent trustee a defendant, and the chancellor, (Johnson,) on the 3rd of December, 1847, passed a *pro forma* decree, confirming the report and accounts of the auditor, and overruling the exceptions of the complainants, who appealed therefrom to this court.

The cause was argued before Dorsey, C. J., Chambers, Magruder, Martin, and Frick, J.

May and Brent, for the appellants, contended:

That the several exceptions filed by them to the auditor's report, touching the stocks taken in the *Bank of the United States*, chartered by *Pennsylvania*, should have been allowed.

and the said *Lynch* and *McDonald* held personally responsible for the amount of money, or the value of the stock in the *National Bank*, so by them illegally converted by taking stock in the *State Bank*, together with interest on said amount.

1st. Because the power to invest is, by the terms of the will, "to *James Campbell*, *Edmund Lynch*, and *Samuel McDonald*," *nominatim*, and they are to hold the said investment in trust, &c., and, therefore, the power did not extend to *Lynch* and *McDonald*, the survivors, by whom the investment complained of, was made.

Under this head it is insisted, that to create a surviving power, it must be granted to the donees of the power as a class, and not to them by name, and as individuals, whose concurrent judgment and discretion are, as in this case, required.

2nd. Because, conceding even that the power survives, still, in this case, it was exhausted by the first investment, and there being no power to re-invest, it required the sanction of chancery, notwithstanding the temporary and limited duration of the first investment.

3rd. Because, regarded as a question of extent of power, it was a power only to invest in some already existing stock, and not a power to create a new and speculative stock, as has been attempted, in this case, by taking stock in the *Pennsylvania Bank*.

In support of this view, we refer to the terms of the will, limiting the power, and requiring it to be exercised by investing in "some safe and profitable stock." By which we understand the power to be confined to some stock which, by past experience, is to be taken as *prima facie*, safe and profitable, something which is reputed safe, and which, by past operations, has made profits; not the original creation of a stock, as in this case, saddled with an enormous incumbrance *in limine*, in the shape of an exorbitant bonus, which involves a sacrifice of the capital to a certainty, in part, and which depends wholly on speculation, whether it will, or will not be profitable in future.

Thus far we insist, that by the investment excepted to, there has been an excess of power in the acts of the trustees, and if

so, there is no necessity to consider the *bona fides* of their acts, the legality of which depend on the construction of their powers.

4th. Because, even on the hypothesis that the trustees did not exceed their powers, yet it was a gross abuse of power for these trustees to travel out of the State of *Maryland*, to create a new State bank, under the authority of the legislature of *Pennsylvania*, predicated as that bank was, upon principles and sacrifices of capital hitherto unknown in the history of such local banks, and in support of this view we refer to the charter in evidence, and the statements of *Nicholas Biddle*, also in evidence, made at the meeting of stockholders.

5th. Because the facts agreed show, that in making the investment complained of, the trustees did not act on their own personal judgment and discretion, but undertook, beforehand, to delegate all their discretion and judgment in the premises to *Nicholas Biddle*, by the power of attorney exhibited in the record, which, as practically carried out, devolved the trust to a stranger, under whose substituted agency this investment was made, thus depriving the *cestui que trusts* of that personal judgment and discretion of the trustees, which was required of them by duty and law, and which, under these circumstances, they cannot now invoke as their protection in this disastrous investment.

In support of this view, it will be seen that *Nicholas Biddle* was authorised by these trustees to apply to any State legislature for any kind of charter he thought proper, and to accept such charter according to his own individual judgment; that whatever might be the character of *Biddle's* acts, the trustees bound themselves to ratify them, and that the whole investment was, in fact, made by *Biddle*, under this power of attorney, and with no special approval or ratification of those acts of the substituted trustee, further than can be implied from the receipt of dividends by the trustees proper, at a time when the investment had been made by *Biddle*, and the agency consummated without the slightest exercise of personal judgment or discretion by the testamentary trustees.

6th. Because the evidence shows, that the stock taken in the *State Bank of Pennsylvania*, ceased to pay dividends in July, 1839, and after that date, underwent a fixed and gradual decline through a series of months, until it depreciated to a mere nominal value, during all which time the trustees took no action to protect the interests of the *cestui que trusts*, and have thus, by their gross laches, charged themselves with the full amount of loss to the trust fund.

Finally, it is insisted, that the pretext set up by the trustees, that they, or one of them, had invested a much larger sum of his own money in a similar way, and, therefore, he has acted *bona fide* with the trust funds, cannot be relied on as any equitable bar to the breach of fiduciary duty proved against the trustees, because very different considerations apply to the delicate discharge of the duties of fiduciary agents, and to the rights of individuals to waste or squander their own private funds.

We also deny that the acquiescence of the married women, *cestui que trusts* for life, in the disputed investment, can at all affect the liability of these trustees, or that the acquiescence of any of the remainder men, can affect such liability.

Lloyd and R. Johnson, for the appellees, contended:

1st. That it being admitted in the cause, that the original investment in the stock of the *Bank of the United States*, was authorised by the will, the defendants (appellees,) had the same authority to invest in the stock of the *Bank of the United States*, chartered by *Pennsylvania*.

2nd. That in exercising that authority, the appellees were only bound to observe such care and prudence as men of ordinary care and prudence would have observed in investing their own funds.

3rd. That having made the investment, the appellees were not responsible for the ultimate result, if they treated it afterwards *bona fide*, and as men of ordinary prudence would have acted, if the said investment had been their individual property.

4th. That the investment was known to the *cestui que trusts* for life, and their husbands, by whom the dividends in the original, as well as the substituted investments, were all received from the appellees, as due to them under the will, which, as far as they are concerned, estops them from denying the legality of such investments; and that, in a case like this, in the absence of all *mala fides* on the part of such *cestui que trusts*, and the appellees, and either of them, such conduct and acts on the part of the *cestui que trusts* for life, equally protect the appellees from all claim on the part of the *cestui que trusts*, in remainder for any loss sustained, in fact, afterwards, from the investment.

5th. For the reasons stated in the 4th point, it not being pretended that the said *cestui que trusts* for life, or any other person interested in the said trust estate, applied to the appellees to dispose of said investment, on the ground that it was becoming, or likely to become, a losing one, the appellees are not responsible for the eventual loss, if they acted and continued to hold the stock in good faith, as it is admitted they did.

Magruder, J., dissented, and delivered the following opinion:

In dissenting from the opinion of the majority of the court, I do not wish to be understood, as subscribing to all the legal positions which were taken by the counsel for the appellants. I may say, however, that there are points, of which I do not mean here to take notice, which I would rather should become the settled law of *Maryland* without, than by, my agency. Trustees are safe, when they act in the execution of the trust, by the advice of the chancellor, and his directions in regard to the investment or reinvestment of the trust fund, they might at any time have obtained. Indeed, I am unable to say that these trustees were quite safe in any act that was required of them, without the sanction of the chancellor. They proposed to invest the trust fund in the stock of a bank, whose charter was to expire before the trust was to be distributed, a step which, when it can, ought to be avoided.

But still I will not say, that for the original investment, without any application to the court of chancery, they can be condemned. When, however, the charter of the *United States Bank* was about to expire, and the question was to be decided, in what other stock this investment was to be made, there was no law which authorised them to constitute *N. Biddle* their attorney, and surrender to him all the powers which the will gave to the trustees, and the law gives to the court of chancery. He, *(Biddle,)* was to act in person or by attorney, and, in person or by attorney, decide for these *cestui que trusts*, whether this portion of the trust fund should be invested in a new bank, just about to be brought into existence, if the president of the old and the expected president of the new bank, should obtain of the old stockholders sufficient proxies to establish the State bank.

The power thus delegated to this attorney, is the power which the will that created the trust did not authorise them to delegate. An attention in person to their duties, may be attended with some inconvenience to the trustees, but this they undertake when they accept the trust, and, especially, when, by their own act, in making the investment in stock so far from them, it becomes necessary for them to submit to that inconvenience. Had they attended in person, and exercised their own judgment, it is difficult to say what might have been their decision, but it may reasonably be expected, that they would have considered it their duty to recall the power of attorney, when they heard their own agent urge as a reason for the investment of all the stock, even the stock held by citizens in *Maryland* in the new bank, because, "although it could, doubtless, have obtained a charter elsewhere, on much lower terms, yet it would have been an exile, instead of continuing to be, what it has been forty years, a bank of the *United States, at Philadelphia*. Again, the question to retain, (in *Pennsylvania*,) an existing capital, which would leave the State, and not merely leave the State, but go into the service of its neighbors to make rival improvements to its own. Here it is already collected in the State, belonging mainly to persons

out of the State, but left here to be managed by *Pennsylvanians*, and for the benefit of *Pennsylvania*." Surely these and other remarks made to the stockholders, when assembled, would not have been heard, if proxies had not been so liberally granted by distant stockholders to the author of them.

Such an agent could scarcely be deemed a faithful agent, to be entrusted with such powers by trustees living out of the State, and acting for others, residents elsewhere. It is not believed that the chancellor, if he had been consulted, and seen the remarks of the agent, which are made, by consent, a part of the evidence in this case, would have considered himself at liberty to continue this trust fund in an institution, under the management of this agent, and with the avowed purpose of appropriating to its own *(Pennsylvania's,)* exclusive use, a vast amount of capital.

I have heretofore been induced to think, that I was, perhaps, rather disposed to act with too much lenity, when judging of the conduct of trustees, and determining their liability. I certainly have not thought favorably of every thing that I have read in regard thereto in the *English* books, and sometimes, (especially when counsel for the unsuccessful party,) have questioned the correctness of some things said occasionally by this court. But certainly, (especially since the case of *Ringgold and Ringgold*, 1 *H. & G.*, 11,) have never supposed that trustees, acting as these trustees are proved to have acted, could rightly insist, that losses thus sustained, must be sustained by innocent and confiding *cestui que trusts*.

In the case of *Ringgold and Ringgold*, 1 *H. & G.*, 11, both the chancellor and this court spoke of those trustees who do not act, "*bona fide*, within trust limits." "But when the trustee" said the chancellor "transcends his limits, then he becomes responsible for the utmost value of the funds thus misapplied." The line of duty must be strictly pursued, no part of the property must be put within the control of persons who ought not to be entrusted with it. If he does and a loss be thereby incurred, such personal representative will be liable to make it good, however unexpected the result, however little likely to

arise from the course adopted, and however free such conduct may have been from improper motive. *2nd Spence Equity Jurisdiction*, 934.

As, however, a majority of the court have come to the conclusion, that these trustees are not to be accountable for the appointment of an agent, when not authorised to appoint him, and for the loss sustained by the trust fund, by reason of his acts, I shall not give more in detail my reasons for thinking otherwise. I must, however, think, that the loss here to be sustained, ought to be borne by men who undertook the trust, and then transcended the bounds of their trust duty; who conferred upon an individual, whom they were not authorised to employ, all the powers which the will gave to them, and which the law confides to the chancellor.

Dorsey, C. J., delivered the opinion of this court.

The only matters in controversy in the case before us, relate to the liability of the trustees, the defendants, for the amount of the loss sustained by the trust fund, by reason of the defendants, on the 10th of February, 1836, having united with the other stockholders of the old *Bank of the United States*, in the acceptance of the charter of the new *Bank of the United States*, incorporated by the State of *Pennsylvania*, on the 18th of February 1836, and surrendering two hundred and twenty-one shares of the capital stock of the old bank, (which was held by them as their investment of part of the trust fund,) and accepting, in lieu thereof, two hundred and twenty-one shares of stock of the new *Bank of the United States*.

From the nature of the complainants' bill, the trustees had no right to anticipate, in reference to this bank stock, any charges against them of negligence, misconduct, want of judgment and discretion, or violation of duty, or transgression of their powers; or that at the time of the acceptance of the charter of the new bank, its substituted stock for that of the old bank, was not to be deemed an investment in "safe and profitable stock," as directed by the will of the testator, whether it were to be regarded as an entirely new investment, or as a

quasi continuation of the old one. No such charges having been made in the bill, the defendant trustees, have been deprived of the benefit, which a denial or explanation in their answer would have given them. Indeed, looking only to the allegations in the bill, it might have been fairly concluded, that to this investment in the stock of the new *Bank of the United States*, the complainants designed to take no exception. Into such a quiescent inference the defendants might very naturally have been lulled, and if it were necessary to do so for their protection, this court might well require stronger and more conclusive proof on the part of the complainants, to entitle them to the relief claimed for them in the argument before us, than would have been demanded of them, had their bill, with the customary fullness and fairness, disclosed to the defendants the nature and grounds of the claim to which they were called upon to respond. Let it not be supposed for a moment, (for nothing is further from our opinion upon the subject,) that there was any sinister design in thus framing the bill, but we merely refer to it as, in its tendency, indicating to the defendants, that its object was to seek relief for different grievances than those now urged before this court. The trustees being the only defendants in interest, when the term defendants is used, the trustees only are embraced by it.

In the course of the argument of the various points relied on in this case, to charge the defendants with the loss complained of, an immense mass, both of *English* and *American*, authorities have been referred to, to prove that in the States or country where those decisions were made, an investment of a trust fund by executors, guardians or trustees, in bank stock, was a breach of trust, and subjected those by whom it was made to all the losses and casualties resulting therefrom. In answer to these authorities, it might perhaps be sufficient to say, that the *English* chancery rule, in regard to the securities in which trust funds can only be legitimately invested, has never literally, nor analogically, been extended to *Maryland;* and that the *American* authorities cited, for the most part, depend on statutory enactments of the States in which those decisions have

been made, or rest on principles sanctioned by the courts of those States, but which have never been adopted, directly or indirectly, in the State of *Maryland;* and we do not think it would be doing justice to the chancery court, or the parties in this cause, even if there existed no other reason for its refraining to do so, for this appellate tribunal now, for the first time, to establish a new rule upon the subject, designed to control not only the future action of the judicial tribunals of this State, but which might invalidate transactions almost without number, the legality of which heretofore had never been doubted, and might create liabilities never before dreamed of, to an amount of which this court cannot form even a conjectural estimate.

But this court is withheld from adopting the principle contended for by the appellant, upon other and sufficient grounds. It is a matter of notoriety, a part of the public history of such transactions in *Maryland*, that trustees, &c., holding funds directed to be invested in stocks, have been in the habit of making such investments in bank stock, and especially in the stock of the *Bank of the United States*, when such an institution was in existence. And if such usage had never existed before, in the absence of express legislation upon the subject, its commencement would have been analogically justified by the fourth and fifth sections of the act of 1831, ch. 315, which enact: "That the orphans courts of the several counties in this State, be, and they are hereby authorised and empowered, in their discretion, and whenever to them it shall seem proper, either *ex officio* or upon application, to order any executor or administrator, to whom they may have granted letters testamentary or of administration, to bring into court, or place in bank, or invest in bank stock, or in any other good security, any money or funds received by such executor or administrator." And the same authority, in the same terms, is given to the orphans court in respect to money or funds in the hands of guardians. With a knowledge of the usage, as to investments of trust funds in bank stocks, and these provisions of the act of 1831 before us, to hold trustees liable for all the losses that

may occur, solely on the ground that they had made an investment of the trust fund in bank stock, would, in *Maryland*, be an act of extreme rigor, not to say of injustice towards them, which this court cannot be induced to perpetrate. But, as conclusive evidence, to show that in *Maryland* no such rule exists as that contained in the authorities cited, by which bank stock is repudiated as a security, in which trust funds may be lawfully invested, the opinion of *Chancellor Bland*, to be found in *Hammond vs. Hammond*, 2 *Bland*, 412 *and* 413, may be confidently relied on. He, with a diligence worthy of all commendation, had examined into all the rules, practice and decisions of his predecessors in office, and designing, as we cannot doubt, not to depart therefrom, delivered his opinion in the case referred to, from which the following is an extract: "The meaning of the phrase, 'good security,' used by the testator, must be taken in connection with that indefinite and, perhaps, great length of time, during which, it is very evident, he intended it should be 'good security;' and thus understanding the testator to mean, permanently and durably, good security, I feel my discretion must be limited to a selection among securities of that description, that is, government stock, or a mortgage on unincumbered real estate, or *good bank stock*."

The complainants insist, that the trustees, *Lynch* and *McDonald*, ought to be "held personally responsible for the amount of money or the value of the stock in the *National Bank*, so by them illegally converted, by taking stock in the State bank, (meaning the new *Bank of the United States*,) together with interest on said amount," on six separate grounds. The first of which is, "because the power to invest, by the terms of the will, is to '*James Campbell*, *Edmund Lynch* and *Samuel McDonald*," *nominatim*, and they are to hold the said investment in trust, &c., and therefore the power did not extend to *Lynch* and *McDonald*, the survivors, by whom the investment complained of was made." To sustain this position, an immense number of authorities has been referred to, the force of which it would be difficult to obviate, were the case before us one of a mere naked power, and not of a power coupled with

an interest or trust. From the nature, objects and provisions of the will, apart from all authorities on the subject, we think it might be satisfactorily shown, that it was the intention of the testator that the powers given to the trustees, should, upon the death of one of them, enure to the survivors. But, from the necessity of proving such intention apparent upon the face of the will, we are relieved by the conclusiveness of the numerous authorities, settling against them the principle for which the appellants contend, a reference to which is the only answer that need be given to their argument upon the subject.

In *Franklin vs. Osgood*, 14 *John.*, 527, it was held, that "where the power, *per se*, is merely a naked power, and yet in other parts of the will, there are trusts and duties imposed upon the executors which require a sale to be made, in order to effectuate the intent of the testator, in such case the power survives." In *Taylor, et al., vs. Benham*, 5 *Howard*, 233: "A power to sell, coupled either with an interest or trust, survives to the surviving executor. So also if all the trustees or executors in such a case decline to act except one." In *Peter vs. Beverly*, 10 *Peters*, 532: "The general principle of the common law, as laid down by *Lord Coke*, and sanctioned by many judicial decisions, is, that when the power given to several persons, is the mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But where the power is coupled with an interest, it may be executed by the survivor. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive, though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that make the interest in question." "And where there is a trust charged upon the executors in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for the want of a trustee." That the power given to the trustees in

this case was coupled both with an interest and a trust, nobody who reads the will can entertain one moment's doubt. In *Lewin on Trusts*, 266, it is stated, that "on the death of one trustee, the joint office survives." And, "it is a well known maxim, that a bare authority, committed to several persons, is determined by the death of any one, but if coupled with an interest, it passes to the survivors." "It follows, that as co-trustees have an authority coupled with an interest, their office must be impressed with the quality of survivorship; as if an estate be vested in two trustees, upon trust to sell, and one of them dies, the other may sell; otherwise, indeed, the more precaution a person took by increasing the number of trustees, the greater would be the chance of the abrupt determination of the trust by the death of any one." In *Hill on Trustees*, 303, it is said: "Where more trustees than one are appointed, the trust property is almost invariably limited to them as joint tenants; and even if the terms of the gift rendered this at all doubtful, the court, for sake of convenience, would doubtless endeavor, if possible, to affix this construction to it." "Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on continually to the last survivor." Many other similar authorities might be referred to, but too much has already been said on so plain a proposition, and but for the apparent confidence with which it was denied, its announcement by the court would have been all that would have been deemed necessary for its establishment.

But, it is said, conceding the principle of survivorship in relation to such cases, apart from all legislation upon the subject, yet that the principles of joint tenancy are wholly abrogated by the act of 1822, ch. 162. All that need be said in answer thereto is, that this act of Assembly was not intended to apply to devises or grants made to trustees for the benefit of third persons. Survivorship in such cases, formed no part of the evil designed to be remedied, and not being within the intent or spirit of the act, is not embraced by it.

The second ground upon which the appellant claims a reversal of the chancellor's decree is, "because conceding even that the power survives, still, in this case, it was exhausted by the first investment, and there being no power to reinvest, it required the sanction of chancery, notwithstanding the temporary and limited duration of the first investment." This restrictive construction of the powers of the trustees, we think wholly inconsistent with the intention of the testator, collected from the provisions of the will itself. If the investments first made, without any default on the part of the trustees, returned, or were about to be returned, to their hands in money, and there to remain unproductive, but by a reinvestment, it would have been in them a breach of duty, by clear implication, imposed upon them by the manifest intention of the testator, not to have made provision for such a reinvestment. The acts of the trustees here complained of, ought not to be regarded as a new or reinvestment of a portion of the testator's estate, of which a previous investment had been made, but rather as efforts of the trustees, designed to preserve and protect the original investment, and to keep it, as nearly as practicable, in its primitive condition. To suppose that the testator intended to withhold such authority from his trustees, is to impute to him a degree of folly, distrust and inconsistency, for which the provisions of his will furnish not the slightest warrant.

But, suppose it be conceded that this substitution of the stock of the old for the stock of the new *Bank of the United States*, was an original investment, which the trustees were, strictly speaking, not authorised to make without the sanction of the chancery court. Can a doubt be entertained, looking to the proof in the cause, the agreements of the parties, admitting the truth of all that is said upon the subject in the answer of the appellees, in connection with the fact that every stockholder of the old *Bank of the United States* assented to the substitution, (except the *United States*, which acted upon principles foreign to those of all other stockholders,) that a court of equity, if applied to by the trustees at the time, would have sanctioned the investment? We think such a doubt cannot rationally be

entertained. It is a settled rule in chancery, that where a trustee does, without an application to the court, an act which would have been ordered, if authority for that purpose had been previously applied for, and at the time of the act being done, it was obviously for the benefit of all concerned, such act will be ratified and affirmed, and held of the same validity as if it had emanated from the previous order of the chancellor. The second ground, therefore, relied on by the appellants, can avail them nothing towards reversing the decree of the chancellor.

Their third ground is, "because regarded as a question of extent of power, it was a power only to invest in some already existing stock, and not a power to create a new and speculative stock, as has been attempted in this case, by taking stock in the *Pennsylvania Bank*." For this limitation on the judgment and discretion of the trustees, we see no warrant in the will, and therefore are not disposed to adopt it. Suppose such a will were of recent date, with all the funds ready for investment in the hands of the trustees, and Congress were now to incorporate for fifty years a new *Bank of the United States*, with far more beneficial and extended powers than those possessed by the late bank, could it be gravely urged, that as an investment, they could not subscribe for stock in such bank? We think not. If the trustees had no such power, it could not be communicated to them by any sanction given by the chancery court.

The fourth ground is, "because, even on the hypothesis that the trustees did not exceed their powers, yet it was a gross abuse of power for these trustees to travel out of the State of *Maryland*, to create a new State bank under the authority of the legislature of *Pennsylvania*, predicated, as that bank was, upon principles and sacrifices of capital hitherto unknown in the history of such local banks, and in support of this view, we refer to the charter in evidence, and the statements of *Nicholas Biddle*, also in evidence, made at the meeting of stockholders." The power in the trustees to make the investment being conceded, the residue of the objection to it is irre-

futably answered by the controlling circumstances under which it was made, by the admitted facts in relation to it contained in the answer, and by the overwhelming fact, that every other stockholder in the old bank made a like investment, the *United States* excepted, which declined doing so for reasons not applicable to other stockholders.

The appellants fifth ground is, "because the facts agreed show, that in making the investment complained of, the trustees did not act on their own personal judgment and discretion, but undertook beforehand to delegate all their discretion and judgment to *Nicholas Biddle* by the power of attorney, exhibited in the record, which, as practically carried out, devolved the trust to a stranger, under whose substituted agency this investment was made, thus depriving the *cestuis que trust* of that personal judgment and discretion of the trustees which was required of them by duty and law, and which, under these circumstances, they cannot now invoke as their protection in this disastrous investment." In the argument on behalf of the appellants it was insisted, that to determine on the expediency of surrendering the stock in the old bank, and accepting in lieu thereof the same number of shares in the new bank, required both judgment and discretion, after a full examination of the affairs and condition of the old bank, if compelled to wind up its affairs on the expiration of its charter. That to enable the trustees to decide on the propriety of the course they were about to pursue, it was their indispensable duty to visit the mother bank at the city of *Philadelphia*, and minutely examine into its concerns, and meet in consultation with the other stockholders, before giving their assent to the conversion of their stock in the old, into the stock of the new bank of the *United States*.

If such were the indispensable duty of trustees holding stock in the old *Bank of the United States*, it would attach as well to trustees residing in *New Orleans*, *California*, *London*, or the most remote quarter of the world, as to those resident in *Baltimore*. And the obligation is equally imperative, whether the fund in trust be large or small in amount, and all the trus-

tees are equally bound to discharge this duty, whether the number be one or twenty, because trustees can no more delegate their powers to each other, than they can to a stranger. It cannot be denied, that the trustees would be entitled to reimbursement, out of the trust fund, for their expenses thus incurred in the discharge of their duties. And should the trust fund be small, it might be wholly consumed in the expenses of the trustees. And *cui bono* would such waste of time and money be incurred? Would the officers of the bank throw open to their inspection its vaults, count its specie, exhibit its bills, bonds, notes and other securities, and submit to their examination all the bank accounts of its customers and officers? Certainly not. But, suppose they had done so, would the object of their investigation be obtained? It cannot be pretended that it would. The trustees, to obtain that reliable information, which would warrant the exercise of their judgment and discretion, according to the requisitions of the appellants, must perform a pilgrimage to every State in the Union, in which a branch might be located, and there pursue, with respect to it, a similar process of investigation, and to be consistent, they must visit and investigate the accounts and transactions of the agencies of the bank in every part of the commercial world. And to form any satisfactory basis for themselves, on which to rest the exertion of their discretion and judgment, in addition to the aforementioned examinations, they must inquire into the ability of all the debtors of the bank, in every part of the world, to pay their debts; and, when all this has been accomplished, it might safely be asserted, that there is not one trustee in five hundred, whose opinion, being the result of his own investigations, could be as safely followed as that of him who formed it exclusively upon a perusal of the stock price current of the day.

But if such extraordinary investigations are necessarily to be made by trustees, before they are authorised to sell or exchange bank stock, when a part of a trust fund, can any sufficient reason be assigned, why similar investigations are not indispensably prerequisite to the security of trustees investing trust funds

in bank stock? In neither case do we regard them as necessary for the protection of trustees, who faithfully, and with ordinary skill and judgment, discharge the duties of their office.

The liabilities of trustees are not created or measured by the unexecuted powers which they may have conferred on their delegate or attorney, but by the powers which he has executed. In their acceptance of the charter of the new bank, and investing in the stock thereof the shares of stock which they held in the old bank, we have before stated that the trustees were justified, and whether such acceptance and investment were made by themselves, in person, or by their delegate or attorney, is, therefore, wholly immaterial. We do not, however, regard the case before us as one in which the trustees, without having exercised their own judgment and discretion in deciding on the expediency of the acts to be done, had transferred their entire powers to their agent or attorney, but a case in which the trustees, having fully exercised their judgment and discretion, with fidelity and reasonable prudence and judgment, authorised their agent, *Nicholas Biddle*, ministerially to do what was necessary to effectuate their determination; at the same time clothing him with a *quasi* veto power over the acts they had authorised him to consummate. This veto power not being exerted, whether it were rightfully conferred or not, is not a question before us.

The sixth point, relied on by the appellants, as a ground on which the decree of the chancellor should be reversed, is, "because the evidence shows that the stock taken in the *State Bank of Pennsylvania*, ceased to pay dividends in July, 1839, and after that date, underwent a fixed and gradual decline through a series of months, until it depreciated to a mere nominal value, during all which time the trustees took no action to protect the interests of the *cestuis que trust*, and have thus, by gross laches, charged themselves with the full amount of loss to the trust fund." However much the authorities may differ, as to the nature of the discretion and the degree of diligence which is required of the trustees in the management of the trust fund, before its investment, there seems little or no diversity of opinion as to the degree of negligence or misconduct which is requisite

personally to charge trustees, after the trust funds have been properly invested. In *Pybus vs. Smith*, 1 *Ves., Jr.*, 193, the lord chancellor says: "You cannot affect the trustees with more than they actually received, without wilful default." In *Jackson vs. Jackson*, 1 *Atk.*, 514: "To compel trustees to make up a deficiency, not owing to their wilful default, is the harshest demand that can be made in a court of equity." In *Willis on Trustees*, 168, it is stated, and the authorities referred to, on which the statement is founded, "that trustees must execute their trusts faithfully, according to the terms of them, and the intention of the parties by whom the trusts have been created; and that it will be presumed that the trustees have done so, unless the contrary clearly and unequivocally appears." In *Thompson vs. Brown*, 4 *John. C. R.*, 628, *Chancellor Kent* says: "This court have always treated trustees, acting in good faith, with great tenderness." And he then quotes, with approbation, from the opinion of *Lord Hardwicke*, in *Knight vs. The Earl of Plymouth*, 1 *Dickens*, 126: "A trustee having in his hands a considerable sum of money, places it out for the benefit of the *cestui que trust*, in the funds which afterwards sink in their value, or on a security, at the time apparently good, and which afterwards turns out not to be so, was there ever an instance of the trustees being made to answer for the actual sum so placed out? I answer no. If there was no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to losses, which he could not foresee, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." In *Massey vs. Banner*, 1 *Jac. & Walk.*, 241, *Lord Eldon* says: "Trustees, agents, &c., are expected to take the same care of the trust funds as a reasonable attention to their own affairs would dictate to them to take of their own property." "The degree of neglect to be made

out for any sum beyond that actually received, is also different and greater." When the trustee is made liable for more, it must be, in the language of the books, "in cases of very supine or wilful default." It is stated by *Chancellor Kent*, in *Osgood vs. Franklin*, 2 *John. C. R.*, 1: "A trustee is not chargeable with more than he has received of the trust estate, unless there is evidence of very gross negligence, amounting to wilful default." The Supreme Court of the *United States* announce the same principle in *Taylor*, *et al.*, *vs. Benham*, 5 *Howard*, 233: "But the executor is not responsible for more money than he received, with interest, unless in case of very supine negligence, or wilful default." In *Hill on Trustee*, 381, the unquestioned principle is stated, that "where the trust moneys are once properly invested in stock, the trustees cannot, without an express authority, dispose of the stock, and invest in other securities." *Justice Story*, after examining various decisions made in the chancery court of *England*, in regard to liabilities of trustees, and the grounds upon which they are founded, says: "The true result of the considerations here suggested, would seem to be, that where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own perperty, he ought not to be held responsible for any losses accruing in the management of the trust property."

Upon a fair application of the principles sustained by the authorities referred to, to the conduct of the trustees, as presented in the record, ought the chancellor's decree to be reversed, for the reasons assigned in the sixth ground relied on for its reversal? The trustees have been guilty of no supine negligence, or wilful default. They, or at least one of them, (and there is no evidence of any diversity of opinion between them upon the subject,) have acted, in the management of the trust fund, in the same way that they have deemed it advisable to act with regard to their own property of the same kind. Although they could, *ad libitum*, have sold the stock held by one of them, yet it was not deemed expedient or advantageous to do so. Whereas, they possessed no power to sell the bank stock held

in trust; the *cestuis que trust* were legally incompetent to assent to such sale. The only means by which the trustees could have obtained a power to sell, would have been by filing a bill in chancery for that purpose, against the *cestuis que trust*, whose assent to it they could have had, but extremely faint, if any hopes of obtaining, judging from past transactions between them, which are detailed in the record before us; and that the chancellor, without such assent, would have decreed the sale, is, to say the least of it, quite problematical.

Mrs. Gray was, it appears, a widow in 1840, whose administratrix as such, is one of the complainants; and yet, during the four years that she remained a widow, cognizant of all the facts in relation to this stock, it does not appear that she ever applied to the court of chancery herself, or requested the trustees to do so, to obtain for the trustees an authority to sell. Nor is it literally true, that after July, 1839, the stock "underwent a fixed and gradual decline through a series of months, until it depreciated to a mere nominal value" According to the statement of prices at which the stock sold in *Philadelphia*, which, by agreement, is evidence before us, the decline in price was not fixed and gradual, but the price continued to fluctuate, sometimes rising and sometimes falling. In the month of October, 1839, the price of stock advanced $16 per share, in the course of five days. The trustees, therefore, who could only judge of its value by the price it bore in the stock market, cannot be charged with supine neglect, or wilful default, because they were unable to determine that, at any particular time, a sale of the stock would be advantageous to the *cestuis que trust*, much less that it would be so at the time when a decree for that purpose could be obtained from the court of chancery. On the contrary, the trustees have, in their answer, denied all neglect or default on their part, and most positively averred that they acted with fidelity, according to the best of their judgment and discretion, and with a view to promote the interest and benefit of the *cestuis que trust*. It appears, also, that one of the trustees held, in his own right, a larger amount of the stock of the new *Bank of the United States*, than that held in trust;

that he acquired title thereto in the same way, and has ever since continued the holder thereof. All these facts, and every thing stated in the answer, in relation to the stock of the bank, (except that the *cestuis que trust* approved of the substituted investment,) are, by agreement of the parties, admitted to be true. A court which, under all these circumstances, could charge the appellees with the claim now preferred against them, we must be excused for saying, would rather deserve any other name than a court of equity.

The decree of the chancery court is affirmed with costs, both in this court and in the court of chancery.

DECREE AFFIRMED.

GEORGE R. RICHARDSON, AND OTHERS, *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE.—*December*, 1849.

Upon a bill filed by the appellants, alleging that the damages for the opening and extension of certain streets in the city of *Baltimore*, secured to them by the act of 1837, ch. 358, had not been assessed to them by the street commissioners of said city, in their proceedings for the extension of said streets, and that upon appeal to the city court, the jury had, also, in their assessment of damages, made no assessment of damages to the complainants, who were, thereby, absolutely denied the rights vested in them by said act, the chancellor granted an injunction restraining the appellee from collecting the assessments made by the jury. The answer of the appellee averred, that the provisions of said act of Assembly were especially brought to the attention of the jury, and fully discussed, and deliberately considered by them, and the chancellor thereupon ordered the injunction to be dissolved, which order was affirmed upon appeal.

Courts of equity will interfere where courts of ordinary jurisdiction are inadequate instruments of justice, to restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to third persons by the doubtful title of others.

The chancery court has no right to interfere to arrest the proceedings of the

judgment of *Baltimore* city court, on the ground of legal error; it has no supervisory power over courts of law.

To justify the interposition of equity, there must be some inequitable advantage taken, which would render it unconscientious in the party obtaining it, to enforce the judgment, and of which the party seeking the aid of equity could not have availed himself at law, or was prevented from doing so by fraud or accident, or the act of the opposite party unmixed with any fraud or negligence on his part.

Appeal from the *Court of Chancery*.

The legislature, by the act of 1837, ch. 358, appointed certain commissioners "to open and condemn, as public highways forever, all such streets, lanes and alleys, or such parts thereof, within the bounds of the estate of the late *David Moore*, and within the limits of the city of *Baltimore*, as they may deem advisable." The 2nd section of this act provides: "That if at any time hereafter, any of the above mentioned streets, lanes or alleys shall be further opened and extended beyond the limits of the said estate, and any part or parts of the said estate shall be taxed for such opening or extension, then and in such case, the proprietor or proprietors of any and every such part or parts so taxed, shall be considered as entitled to one-half of the bed of the street immediately in front of such part or parts, and shall be entitled to damages for the taking of the same, in the same manner as he, she or they might do, if the said street were then to be first opened and made public."

These commissioners opened and laid out *Biddle* and *Orchard* streets, within the limits of said estate, and the appellants purchased lots upon them, and became proprietors of a part of said estate.

Subsequently, on the 13th of March, 1847, the appellee, the *Mayor and City Council of Baltimore*, in pursuance of the powers vested in them by the act of 1838, ch. 226, and in pursuance of the general ordinance of the 15th of May, 1846, relating to streets, upon the application of one *Richard Dorsey*, passed an ordinance to extend *Orchard* street from *Tessier* street to *Pennsyluania* avenue. This extension was beyond the limits of said *Moore's* estate. The street commissioners, in

execution of this ordinance, proceeded to assess damages and benefits, and made their return thereof to the register of the city. These assessments are stated in the opinion of the chancellor.

The appellants and others, considering themselves aggrieved by these proceedings, on the 21st of October, appealed to *Baltimore* city court, according to the act of Assembly, providing for such appeal. The city court appointed the 26th of February, 1848, for hearing this appeal. The cause was then postponed, from time to time, until the 13th of July, 1848, when the appellants filed in said city court a motion to quash the proceedings and return of the said commissioners, because, by the act of 1837, ch. 358, said commissioners were bound to assess, for injuries, the lots of those persons on *Orchard* street, who claim under the representatives of *David Moore*, constituting half the bed of said street above *Tessier* street, which is wholly omitted; and on the same day said court passed the following order: "The commissioners appointed to open *Orchard* street to *Pennsylvania* avenue, not having complied with the provisions of the act of 1837, ch. 358, in the assessment of damages, but having made their assessment in total disregard of said act of Assembly, the court, on motion of the appellants' counsel, order the proceedings to be quashed."

On the 13th of September, following, the *Mayor and City Council* filed a petition in said cause, in which, after calling the attention of the city court to the act of 1838, ch. 226, and the general ordinance of the 15th of May, 1846, the 9th section of which ordinance provides, that the judges of said city court shall not reject or set aside the record of proceedings of the street commissioners, for any defect or omission, either in form or substance, but shall amend or supply all such defects and omissions, and increase or reduce the amount of damages and benefits assessed, and alter, modify and correct said return in all or any of its parts, as they, or a majority of them, shall deem just and proper, and to the fact that this revisory power of the city court has been fully sustained by the Court of Appeals, they pray that a day may be fixed for hearing the

appeal, and the ascertainment, by a jury, of damages and benefits.

On the 18th of September, the said court ordered the following opinion to be filed: "The city commissioners, appointed for opening *Orchard* street, have confined themselves, in their calculations, only to the part of the street extended to *Pennsylvania* avenue; whereas, by the act of Assembly, 1837, ch. 358, it was their duty to have valued the property on that part of the street already opened by special commissioners, making those allowances for the beds of streets as directed by said law. Their valuation will, no doubt, cause some alterations to be made in the valuation returned for the extended part under the ordinance, and of course will require a revision of the whole. The court would, if they had the power, order the commissioners to review and amend their proceedings, so that the whole case should come before the court on the appeal, but as the city council have prescribed a different mode of proceeding, authorising the court, only at their discretion, to empannel a jury for the decision of any facts omitted to be considered by the commissioners, and generally to review and report the whole case, have ordered, and hereby order the clerk of the court to issue a *venire* for a jury in said case, forthwith." And on the 20th of the same month, passed the following order: "The court being full, reconsider and rescind the order made on the 13th day of July, 1848, to quash the proceedings in the *Orchard* street appeals, and now order and direct that a *venire* issue in said case, returnable on the —— day of ——— next, at 10 o'clock, A. M., to hear and determine on said appeals." And on the same day an entry of an appeal was made in the case by the appellants.

On the 5th of October following, the *Mayor and City Council* filed another petition, averring that the judgment of the city court, in the premises, is final and conclusive, and that the proceedings should not be delayed by the entry of the said appeal. This petition also calls the attention of the court to the fact, that no day had been appointed by them for the return of the

venire, and prays that an early day be fixed for the return thereof.

On the 7th of November, the *venire* was issued, and made returnable the next day, when the jury thereby summoned, was duly sworn, as a jury of inquest for the trial of said appeal; and on the 28th of November, they rendered their inquisition, assessing damages to certain persons named, amounting to $3,829.18, and expenses to the amount of $435.74, and benefits to be paid by certain persons named, among whom are the appellants, to the amount of $3,835.92, and sale of materials amounting to $429. On the same day the appellants made objection to the receipt of the aforesaid inquisition, but assigned no reasons; and on the 11th of December, the court passed an order approving and confirming this inquisition.

The register being about to proceed to collect the benefits assessed by these proceedings, the appellants, as proprietors of parts of the estate of said *David Moore*, filed their bill on the 27th of December, 1848, praying for an injunction to restrain the said *Mayor and City Council* from proceeding to collect the said sums assessed upon them, and for general relief. And on the same day the chancellor (Johnson,) ordered the writ of injunction to issue, as prayed.

The allegations of the bill, and of the answers thereto, are fully stated in the following opinion of the chancellor, delivered on passing the order dissolving the injunction:

"The prayer of the bill in this case does not seek, nor did the injunction granted by this court prohibit the defendants from proceeding to open and extend the street in question, though it may be that the interdiction to collect the sums assessed upon the complainants, and others similarly situated, might have the effect to delay it.

"Upon the facts stated in the bill, the chancellor thought this court had jurisdiction to prevent the assertion of the right claimed for the *Mayor and City Council of Baltimore*, and ought to exercise its power, because the assertion of that right would be productive of irreparable damage to the complainants. If the provisions of the 2nd section of the act of 1837, ch.

358, were totally disregarded by the jury, in estimating the sums to be paid by the proprietors of the estate of *David Moore*, then it seemed very clear that a wrong would be inflicted upon the complainants, for which, without the interposition of this court, there could be no redress.

"It is not easy to define, with accuracy, the powers and duties of this court, and any attempt to do so, has been said, by a learned judge, to be perilous and unsatisfactory; but the general enumeration of these powers and duties, as given by *Lord Redesdale*, and which will be found in *Mitford's Eq. Pl.*, by *Jeremy*, 111, 112, is considered, by *Mr. Justice Story*, as perfect as the nature of the undertaking will admit of. In that enumeration it is said, among other things, that the jurisdiction of the court, 'when it assumes a power of decision, is to be exercised where the courts of ordinary jurisdiction are inadequate instruments of justice.' 'To restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to a third person, by the doubtful title of others.' It appeared to me that the right and duty of this court to interfere in this case, was vindicated by these principles. The legislature, by the act referred to, had declared, in explicit terms, that, in a certain event, the proprietors of the estate of the late *David Moore*, should be entitled to damages for one-half of the bed of the street or streets which should be opened through their property; and the bill alleged, that though the event had happened, and the burden referred to had been imposed upon them, the compensatory advantage had been denied them. The allegation of the bill is, 'that the commissioners for opening streets, though notified of the act of Assembly, did not award the proprietors any damages for taking one-half of the bed of the street immediately in front of them, as directed and enjoined by the said law, and that upon appeal by them from the act of the commissioners, and after the *Baltimore* city court had quashed their return, and submitted the question to a jury, the jury so ordered by the court, made no assessment of damages to the owners of the property,' &c., and that this finding of the jury was confirmed by the court. The

allegation, therefore, in effect, was, that the complainants had been, by the commissioners and the jury, altogether and absolutely denied the rights conferred upon and vested in them by the legislature; and this, it appeared to me, was not only asserting against these complainants a doubtful title in another, productive of irreparable mischief, but would be permitting the power of the city court to be wielded as an instrument of injustice.

"It was not intended to assume for this court the right to interfere to arrest the proceedings or the judgment of *Baltimore* city court, upon the ground of legal error. This court has no supervisory power over courts of law. If they err, the remedy is by way of appeal, and if there is no appeal, the parties must submit. To maintain the right of this court to examine and correct the errors of *Baltimore* city court, would, as was said by the Court of Appeals, in the case of the *Methodist Protestant Church vs. The Mayor and City Council of Baltimore*, 6 *Gill*, 391, 'be claiming for it appellate authority, where it is wholly incompetent to administer justice, and render full and adequate relief to all concerned.' This court claims no such power, and never interferes, as was said by the court, in the same case, 'unless prompted by conscience, to prevent wrong and injustice, but leaves the party, complainant, to his remedy at law.' Mere error in a court of law, in the estimation of this court, furnishes no ground for its interposition. There must be something else; some inequitable advantage taken, which would render it unconscientious in the party obtaining it, to enforce the judgment, and 'of which the party seeking the aid of equity could not have availed himself at law, or was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with any fraud or negligence on his part.' *Gott and Wilson, vs. Carr*, 6 *G. & J.*, 309. The bill in this case charges, that the jury made no assessment of damages to the owners of the property, as required by the act of 1837, and as the language of the act was explicit, that such allowance should be made in the event which has happened, it seemed to me that it would be against conscience, to suffer

their award to be enforced. The power of this court was not exerted because the city court, after quashing the return of the commissioners, had, as was alleged, after the term, opened their judgment, and ordered a jury to rectify their errors. That, if an error on the part of city court, was a legal error which this court has no right to supervise and rectify, because in doing so, the powers of an appellate tribunal would be usurped, which this court disclaims.

"Supposing the case made by the bill, was a proper one for the interference of this court by injunction, it remains to be seen, whether, as the case now stands, upon the answer and the accompanying exhibits, it should be continued.

"If it appears that the rights of the complainants, founded upon the act of Assembly, were considered by the jury, it would not be in accordance with the principles which have been stated as governing this court, to disturb or obstruct the execution of the decision to which they have come. The bill expressly alleges, that the jury made no assessment of damages to the owners of the property in question. This the answer denies, and avers, that the provisions of the act of Assembly, under which the damages are claimed, were specially brought to the attention of the jury, and fully discussed, and deliberately considered by them. And the record of the proceedings in the city court, shows that the return of the commissioners was quashed by that court, upon the express ground that they had not complied with the provisions of the law. The language of the court being, that 'the commissioners appointed to open *Orchard* street to *Pennsylvania* avenue, not having complied with the provisions of the act of 1837, ch. 358, in the assessment of damages, but having made their assessment in total disregard of said act of Assembly, the court, on motion of the appellants' counsel, order the proceedings to be quashed.' This order was passed on the 13th of July, 1848, and in September of the same year, the *Mayor and City Council of Baltimore* filed their petition in the cause, in which, after setting out the proceedings which had taken place up to that time, and after referring the court to the provisions of the ordinance of the city.

of the 15th of May, 1846, No. 59, and to the 9th section thereof, by which it was declared, that the judges of the city court should not set aside or reject the proceedings of the street commissioners, for form or substance, but should amend or supply all such defects and omissions, and increase or reduce the amount of damages and benefits assessed, and alter and modify and correct the said return of proceedings as the judges, or a majority of them, should deem just and proper; they pray that a day may be fixed for hearing the appeal, and the ascertainment by a jury of damages and benefits.

"Upon this petition, the court, at the same term, pronounced its judgment, in which it declares, that the commissioners appointed for opening *Orchard* street, (by ordinance No. 9 of 1847,) having confined themselves in their calculations only to the part of the street extended to *Pennsylvania* avenue, whereas, by the act of 1837, ch. 358, it was their duty to value the property on that part of the street already opened by special commissioners, making the allowances for the beds of streets as directed by said law, and then, after declaring that alterations would have to be made in the valuations returned, which would require a revision of the whole, they direct a *venire* to issue for a jury, as the only mode left to them by the ordinance of the city, referred to in the petition. The *venire* issued accordingly, and the jury, on the 8th of November of the same year, formed a verdict, in and by which certain persons were allowed damages, amounting in the aggregate to the sum of $3,829.18, and that the expenses were $435.74; and that certain other persons, among whom are the complainants, should pay certain sums for benefits estimated by the jury, to result to them from opening and extending the street. These sums amount in the whole to $3,835.02, which sum, added to the amount for which the materials sold, being $429, made the aggregate equal to the sum of the damages.

"That this court is not at liberty to supervise and examine the proceedings and judgment of the city court with respect to these averments, has been expressly adjudicated by the Court of Appeals, in the case of *Alexander and Wilson, against The*

Mayor and City Council of Baltimore, 5 *Gill*, 383, and in the same case it was likewise decided, that the act of 1838, ch. 226, and the ordinance of the city, passed in pursuance thereof, and by which the city court was governed, is a valid exercise of legislative power. The return of the commissioners to open the street under the ordinance No. 9 of 1847, was, we have seen, set aside, upon the express ground that they had disregarded the provisions of the act of 1837, ch. 358, and the case was sent to a jury, that the proper correction might be effected and allowances made for the beds of the streets, previously opened by the special commissioners under that act, and it is therefore not to be presumed, that in the consideration of the case by the jury, the same error was committed. On the contrary, the presumption is strong, not to say irresistible, that the jury did make the proper estimate and allowance, and that the damages to which, in their judgment, the owners of *Moore's* property were entitled under the act for the bed of the street, were deducted from benefits which they believed these owners would derive from its extension. This presumption is strengthened by the fact, that a reduction was made by the jury from the amount of benefits estimated by the commissioners.

The estimate of benefits by the latter was, -	$4,001 10
Whilst the jury put them at, - - -	3,835 92
Making a difference of, - - -	$165 18

"It may be that this estimate is erroneous, but over the judgment of the jury in this respect, as is perfectly well settled, this court has no control. If the jury, instead of deducting the damages from the benefits, had given, in separate columns, the amount of each, it would certainly have been more satisfactory, but their omission to do so should not, I think, vitiate their proceedings after their verdict has been affirmed by the court.

"The inquisition was found on the 28th of November, 1848, and the record shows, that on the same day, objection was made on the part of some of the proprietors of *Moore's* property

to its receipt by the court, but the ground of the objection is not stated; and on the 2nd of the then ensuing month of December, the verdict of the jury was confirmed by the court, and the inquisition, subsequently under the order of the court, returned to the register of the city of *Baltimore*, in conformity with the ordinance. Under all the circumstances of the case, as disclosed by the proceedings now before the court, it is, I think, impossible to say that the complainants have not had the benefit of the act of 1837, ch. 358, and have not substantially received such damages as the proper tribunal thought them entitled to under the law, and in this connection it is worthy of remark, that though the bill alleges that the jury made no assessment of damages to the owner of the estate of *Moore*, for one-half the beds of the streets, as provided by the act, it does not allege that the act itself was brought to the notice of the jury, and that though notified, they made no award of damages, as had been alleged with regard to the street commissioners. The presumption is most powerful, that the jury were required to consider this act, and to give such damages to the complainants as they might think them entitled to, and though the inquisition might have been in a form which would have shown this more satisfactorily, I do not, on that account, conceive that I have a right to forbid its execution by injunction.

"It was urged in the argument, that the legislature, by the act of 1838, ch. 226, and the corporation of *Baltimore* city, by their ordinance passed in pursuance thereof, could not take from the owners of *Moore's* property rights vested in them by the act of 1837, and this is a proposition which, it is supposed, will not be disputed; but the act and ordinance in question here had no such effect. The legislature, by the act of 1838, vested certain powers in the corporation of *Baltimore* in relation to streets, and the ordinance provides a mode for executing those powers, and both act and ordinance have received the sanction of the Court of Appeals. The mode pointed out for opening streets has been pursued, not as has been said in derogation of the rights of the complainants under the act of 1837,

but in subordination to them. So far from supposing that any rights vested in the complainants were taken away by the act of 1838, and the ordinance of the city, we have seen that the city court set aside the return of the commissioners, upon the express ground that they had disregarded those rights and sent the case to a jury, for the very purpose of giving the complainants the compensation which, under the law of 1837, they were entitled to, and although the jury may have erred in their estimate of the value of those rights, and may not, by the form of their verdict, have stated in the most distinct manner the amount of the compensation which they did allow, these are subjects over which this court can exercise no control. Upon the whole, I am of opinion the injunction should be dissolved.

From the order dissolving the injunction, the complainants appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, MAGRUDER, and FRICK, J.

PRATT, for the appellants, argued:

1st. That the appellants, as proprietors of parts of *David Moore's* estate, lying upon *Orchard* street, opened by the commissioners named in the act of 1837, ch. 358, were taxed for the extension of said street beyond the limits of *Moore's* estate, and were, consequently, entitled, by the express provisions of the act of 1837, to be considered as entitled to one-half of the bed of the street immediately in front of the part so owned by them, and were entitled to "damages for the taking of the same."

2nd. That by the inquisition of the jury, which was ratified by *Baltimore* city court, no such damage was allowed to the appellants.

3rd. That the proceedings under which said street was extended, were upon appeal quashed by *Baltimore* city court, at May term, 1848, and that the recision of that order, at a *subsequent term* of the court, was illegal.

4th. That for the manifest violation of their rights, secured by the act of 1837, ch. 358, by means of the illegal recision of the order of May term, 1848, the appellants have no remedy except in chancery; that the injunction was properly granted upon the case stated in the bill, and was improperly dissolved at the hearing.

PRESSTMAN, for the appellee, contended:

1st. That the damages granted to the appellants by the act of 1837, were considered by jury and allowed by them in their inquisition.

2nd. That *Baltimore* city court committed no error in rescinding their order granting the return of the street commissioners; and—

3rd. If such error was committed by said city court, it is a mere legal error, which the court of chancery has no power or authority to correct.

BY THE COURT—

ORDER AFFIRMED, WITH COSTS.

RICHARD LAHY AND JOHN COUNSELMAN, *vs.* NATHAN HOLLAND, ADM'R OF SOLOMON HOLLAND, USE OF REUBEN SUMMERS.—RICHARD SMITH, SURVIVOR OF SOLOMON HOLLAND, *vs.* RICHARD LAHY AND JOHN COUNSELMAN.—RICHARD SMITH, SURVIVOR OF SOLOMON HOLLAND, *vs.* SAMUEL COUNSELMAN..—*December*, 1849.

The appellants entered into an agreement, under seal, reciting that they "had rented of *R S*, and *S H*, trustee of *A M W*, for one year, a mill, for which they were to pay one hundred and fifty dollars to *R S*, and one hundred and fifty dollars to *S H*, trustee as aforesaid, or such other trustee of *A M W*, as may be lawfully appointed, said sums to be paid in quarterly payments, recoverable by distress or otherwise, by said *R S* and *S H*, or person authorised

to receive, jointly or separately, as to either of them may be convenient." On the 5th of February, 1839, *S H* brought an action of covenant for the non-payment to him of the $150. The appellants pleaded, that on the 1st of January, 1839, *S H* had resigned his trusteeship of *A M W*, and another trustee had been lawfully appointed in his place. Upon demurrer to this plea, HELD:

That the appellants cannot object that *S H* has lost his character as trustee. Whether trustee or not, does not affect his right to sue under the agreement to which he is the *legal* party. The debt accrued to *S H* in his lifetime, and before the appointment of another trustee, and, of course, survived to his administrator.

Where a covenant is by deed poll, one not named in it, cannot recover on it.

Two tenants in common, may make a lease, reserving portions of the rent to each, and may sever in their actions.

Where the covenant is to several, for the performance of several duties to each, there the covenant shall be moulded according to the several interests of the parties, and each shall only recover so far as his own interest extends.

In this agreement there is no joint legal interest in the covenantees, and each may maintain separate actions for the recovery of his portion of the rent.

If the covenantees have several interests, and the covenant be made with the covenantees, *et cum quolibet eorum*, these words make the covenants several, in respect to their several interests.

The covenant being several to each of the covenantees, *R S* cannot sue for the whole, as survivor of *S H*. neither can he, as such survivor, recover the whole sum against a party who agrees to become security that the covenantors will perform all that is required of them by said agreement.

Appeals from *Montgomery* county court.

The first of these cases, No. 18, was an action of *covenant*, originally instituted by *Solomon Holland*, against the appellants, on the agreement below. *Solomon* dying before the pleadings were completed, the appellee, *Nathan Holland*, as his administrator, appeared to the suit, which was continued in his name, for the use of *Reuben Summers*.

"We have rented, for one year, commencing on the 16th day of the present month, and to end on the 16th day of August, 1831, of *Richard Smith* and *Solomon Holland*, trustee of *Anna Maria Wilson*, the mill, in *Montgomery* county, *Maryland*, known by the name of '*Cabin John Mill*,' for which we are to pay $150 to *Richard Smith*, and $150 to

Solomon Holland, trustee as aforesaid, or to such other trustee of *Anna M. Wilson* as may be lawfully appointed, and the said sums shall be paid in fourth parts, or quarterly payments, recoverable by distress or otherwise, by said *Smith* and *Holland*, or person authorised to receive, jointly or separately, as to either of them may be convenient. We are, at our own expense, to make all such repairs to said mill and the machinery belonging to it, as are now necessary to put it into complete order for use, and also to repair the dam of said mill, clear out and put in good order the race, tail race, and forebay of said mill, and if, after such repairs are made, the dam shall at any time, without the negligence of us, require repairs which will cost more than $5, the same is to be done at the cost of said *Smith* and *Holland*, or those they represent, and, at the expiration of our term, the mill is to be delivered up in as good repair as we are, by this agreement, required now to put it in, and each of us is bound for the full performance of the engagement hereby entered into by us. Witness our hands and seals, this 10th day of August, 1830. Richard Lahy, (Seal.)
John Counselman, (Seal.)

Witness—Gassaway Perry."

The pleadings in the case are fully stated in the opinion.

The cause was argued before Chambers, Spence, Magruder, and Frick, J.

Richard J. Bowie, for the appellants, contended, that the judgment below should be reversed:

1st. Because the right of action was not in *Solomon Holland* individually, but in *Solomon Holland* as trustee, or such other trustee of *A. M. Wilson* as should be lawfully appointed; and the plea that *Solomon Holland* had, before the institution of the suit, viz: on the 1st of January, 1839, ceased to be trustee, etc., being admitted by the demurrer, was a good plea in bar, and should have been sustained.

2nd. That the interest of the covenantees being joint, the suit should have been brought in the names of *Richard Smith* and *Reuben Summers*, trustee of *Anna M. Wilson*.

The *first* point, the appellants think, is established by the terms of the contract. The stipulation was not to pay to *Solomon Holland* absolutely, unqualifiedly, but to *Solomon Holland*, trustee of *A. M. Wilson*, or such other trustee of *A. M. Wilson* as may be lawfully appointed. Another trustee having been lawfully appointed, non-payment to *Solomon Holland* was no breach of the contract.

On the *second* point, the appellants cite as follows: "It is a well settled principle, that covenants shall not be construed to be joint or several, from the particular language in which they may be conceived, but shall be moulded and measured according to the interests of the covenantees." *Platt on Cov.*, 123. 3 *Law Lib.* "If the interests of the parties be several, although the words of the covenant itself be joint, yet the covenant shall be taken to be several; and where the interest is joint, the action itself must be joint, though the covenant, in terms, be joint and several." *Slater vs. Magraw*, 12 *G. & J.*, 270. *Platt on Cov.*, 127.

The subject matter of the contract in this case, is a mill held by the lessors, *Smith* and *Holland*, trustee, jointly, and rented jointly by the lessees, *Lahy* and *Counselman*, out of which the rent, as an incident, was payable jointly to the lessors, according to their respective interests.

The interest of the lessees was not severed, because the terms of the lease gave them a joint or several remedy for the rent; but the interest being joint, still, according to principles above cited, controlled the terms of the contract, and confined the lessors to a joint action. The contract is an entire thing, although it contains several stipulations, and the right of action must be joint or several, it is assumed, upon the whole contract, and cannot be joint as to part of the stipulations, and several as to others.

The lessees, in addition to the covenant to pay, also covenant to keep in repair. It cannot be supposed, that for a breach of the latter covenant, the lessors could sue separately, yet the interest in the rent is not more separate than in the repairs. The portion of each lessor, in the rent, has been ascertained by the

contract; their proportions of the damages for not repairing, would be fixed by law. If the lessees had been evicted, the loss would have been mutual and equal as to the lessors. *Vide Southcote vs. Hoare*, 3 *Taunt*, 87, cited in *Platt on Cov.*, 127. 3 *Law Lib.*

The covenant in this case is with *Smith* and *Holland*, trustee, "or such other trustee of *A. M. Wilson*, as should be lawfully appointed;" which latter words are nearly the same as those used in the case in *Taunton*, where the contract was held to be joint, and not several. *Vide, also, Anderson vs. Martindale*, 1 *East.*, 497.

FRICK, J., delivered the opinion of this court.

Action of covenant instituted by the appellee against the appellant.

The agreement upon which this action is brought, is set forth in the declaration, and recites, that the appellants "had rented of *Richard Smith*, and *Solomon Holland*, trustee of *Anna M. Wilson*, for one year, a mill called '*Cabin John Mill*,' for which they were to pay $150 to *Richard Smith*, and $150 to *Solomon Holland*, trustee of *Anna M. Wilson*, or such other trustee of *A. M. Wilson* as may be lawfully appointed; the said sums to be paid in fourth parts, in quarterly payments, recoverable by distress or otherwise, by said *Richard Smith* and *Holland*, or person authorised to receive, jointly or separately, as to either of them might be convenient." The breach alleged is, that the appellants had not paid the said *Solomon Holland*, in his lifetime, or any other trustee of said *A. M. Wilson*, the said sum of $150. The agreement bears date the 10th of August, 1830; and the appellants plead, that after making the agreement aforesaid, on the 1st of January, 1839, *Solomon Holland* resigned the trusteeship, and ceased to be the trustee of said *Anna M. Wilson*, and that a certain *Reuben Summers*, was lawfully appointed in his place, and is still in full life and being, and that his authority remains unrevoked; to which the appellants demurred, and the judgment upon the

demurrer being in favor of the plaintiffs, the appellants appealed to this court.

This appeal is predicated upon the proposition: 1st. That *Solomon Holland*, on the 1st of January, 1839, having ceased to be a trustee, and being admitted by the demurrer, is a good plea in bar, and should have been sustained by the court below. The action was instituted on the 5th day of February, 1839. But it is not for the appellant to object, that *Holland* has lost his character as trustee, and does not appear on the record as such. The stipulation is to pay *Holland*, and the application of the fund is a matter between him and the party he represents, and on whose behalf he sues. Whether trustee or not, does not affect his right to sue under the agreement to which he is the *legal* party, if the appellants have had the benefit of the contract with him. He does not contract *for Anna M. Wilson*, and she is in nowise responsible for the performance of the agreement. If he fails in his stipulation, or the appellants are disturbed in the enjoyment of the premises, the remedy is not against her, or any future trustee that may be appointed, but against *Holland* himself; and the non-payment of the rent reserved, is a breach of the contract upon which *Holland* alone can sue, while payment to him, absolves the appellants from any further action, either on the part of *Anna M. Wilson*, or any other trustee that may be appointed. The debt or demand, moreover, accrued to *Holland* in his lifetime. The rent then became due, and before the appointment of another trustee. Of course he was the only person entitled to sue, and the debt survived to his administrator. Besides, the covenant is by deed poll, and is, in express terms, to pay *Solomon Holland*, and one not named in it, cannot recover on it. 1 *Salk*, 197. And the intervention of the subsequent trustee, is noticed in the only practicable mode in which he could claim under the agreement, by the entry of the suit to his use. 2nd. It is contended, that the interest of the covenantees being joint, the action should have been brought in the names of *Richard Smith* and *Reuben Summers*, trustee of *Anna M. Wilson*

But the reservation in the agreement is express, that they may claim the rent "jointly or separately, as to either may be convenient." It does not appear, from the agreement, whether they were joint tenants, or tenants in common. But, from this reservation of a separate rent to each, it must be presumed they were tenants in common of the property. Two tenants in common may make a lease, reserving portions of the rent to each, and may sever in their actions. 6 *L. Lib.*, 58. 5 *Barn. and Ald.*, 850.

In *Platt on Covenants*, 123, we find the doctrine as laid down by the counsel for appellants, "that covenants shall not be construed to be joint or several, from the particular language in which they may be conceived, but shall be measured and moulded according to the interests of the covenantees." But he adds, on the same page, "that when it appears that every of the covenantees hath, or is to have a several interest or estate, then, when the covenant is made with the covenantees, *et cum quolibet eorum*, these words make the covenants several in respect to their several interests."

There is no question that, if the interest and cause of action be joint, the covenant is to be so construed as to accord with the interest, even where the covenant is joint and several, or several only in the terms of it. *Platt*, 127. And so decided in *Southcote vs. Hoare*, 3 *Taunt.*, 87. There the covenant was "to and with the covenantees, and with every of them." And this was said, by *Lord Mansfield*, to mean, "with every of the persons entitled jointly." But it is also said, in the same case, "there is a great difference between covenants, where the parties covenant jointly and separately, and where they covenant *with them, and every of them*."

The doctrine more particularly applicable to this case, is to be found in 1 *East.*, 497, cited by the counsel for both parties here. "Where the covenant is to several, for the performance of several duties to each, there the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach, so far as his own interest extends."

The covenant in the case in 1 *East.*, however, was decided to be a joint covenant, being "with *A.*, his executors, administrators and assigns, and with *B.* and her assigns, to pay an annuity to *A.*" Here, although for the benefit of one, yet both have a legal interest. For, upon a covenant with two persons to pay a sum of money to one of them, they take a joint legal interest, and must sue jointly upon the covenant. 1 *Chitty on Plead.*, 3, 4, *margin.*

In the case before us, there is no joint legal interest. *Holland* has no interest in *Smith's*, and *Smith* has no interest in *Holland's* portion of the rent; and although the covenant *authorises* them to consider it a joint or several contract, as to either may be convenient, yet it has *expressly separated their interests* by making one sum payable to *Smith*, and another to *Holland*, and pronouncing them, in this view, separate covenants, is in accordance with the doctrine maintained in the authorities cited.

We subjoin an additional authority from 12 *Wendall*, 156. "Where a covenant is with two, as *A.* and *B.*, and each of them to perform *two several acts*, one for the benefit of *A.*, and another for the benefit of *B.*, a separate action may be brought by each covenantee, in his own name."

JUDGMENT AFFIRMED.

The two other cases, Nos. 19 and 20, were actions of *covenant*. The first was instituted by *Richard Smith*, as surviving obligee of *Solomon Holland*, upon the same agreement as in the preceding case, No. 18, and the second by the same party, in the same right, against *Samuel Counselman*, upon an obligation recited in the opinion below, endorsed upon the said agreement.

The defendants, (the appellees in these two cases, pleaded in each case:—1st. That *Solomon Holland*, in his lifetime,

instituted a suit against defendants on the same cause of action, which is still pending and undetermined. 2nd. The same plea as in No. 18.

To these pleas the plaintiff demurred generally, but the court overruled the demurrer and entered judgments for defendants. The plaintiff appealed.

JOHN A. CARTER, for the appellant, insisted, that the judgment of the court in both these cases was erroneous and ought to be reversed:

1st. Because *Lahy* and *Counselman* covenanted with *Smith* and *Holland* jointly; and although by the terms of the covenant, "the sum of $150 was to be paid to *Smith*, and $150 to *Holland*, trustee of *Wilson*, or such other trustee of *Wilson* as might be lawfully appointed, and made recoverable by distress or otherwise, by *Smith* and *Holland*, or person authorised to receive jointly or separately;" yet, it being a joint covenant with *Smith* and *Holland*, *Holland* could not sue upon it separately, and it is no bar to an action, that one having no right to sue, has instituted a suit upon the same cause of action.

2nd. If the covenant of *Lahy* and *Counselman*, to pay $150 to *Smith*, and $150 to *Holland*, trustee of *Wilson*, or such other trustee as might be lawfully appointed, was not a joint, but a several covenant, upon which *Holland* could recover separately; yet, the covenant of *Samuel Counselman* to become security, "that the above named *Richard Lahy* and *John Counselman* will perform all which on their part they are required to perform," is a joint, and not a several covenant to *Smith* and *Holland*, upon which a joint right of action accrued to them, upon the failure of *Lahy* and *Counselman* to pay the several sums of money mentioned in the covenant, for a breach of which joint covenant, *Holland* could not separately recover. 12 *G. & J.*, 265. 1 *East.*, 497. 12 *Wendell*, 156.

A covenant made with *B*, to pay several sums to *C*, *B*, and *G*, separately, *B* must sue alone. *Wright*, 431.

It is clear, that upon a covenant with two persons to pay a

sum of money to one of them, they take a joint legal interest, and must jointly sue upon the covenant. 1 *Chitty on Plead., pp.* 3 *and* 4, *in margin.*

Where the covenant is joint and several in its terms, yet if it appear that the interest and cause of action are joint, the action must be joint, as if one covenants to do an act for the benefit of two, and binds himself to them, and each of them, for performance, the action must be joint, though these last words are words of severalty. *Slingby's Case*, 5 *Co.*, 18 *b.*

It is conceded by the counsel for the appellees, in his argument filed in these cases, that the covenant of *Lahy* and *Counselman*, was a joint and not a several covenant, and the appellant insists upon the benefit of the concession, together with the authorities there cited, to establish that as a settled point in the cause.

If a cause of action accrued jointly to *Smith* and *Holland*, during the lifetime of *Holland*, it would require a stretch of legal ingenuity to sustain the position, that the cause of action did not survive to *Smith* after the death of *Holland.*

When one or more of several obligees, covenantees, partners, or others, having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor. 1 *Chit. Pl., p.* 21.

R. J. Bowie, for appellees.

We do not think that it necessarily follows, because the contract was joint in interest, that the right of action should be in *Smith*, as survivor of *Holland*, or that there is any inconsistency in contending that both series of actions are improperly brought.

He contends, that by the terms of the contract, the joint interest was in *Smith*, and *Holland* trustee, or "such other trustee as should be lawfully appointed." *Holland* did not hold in "*proprio jure*," but as trustee for another, and the promise to pay was to him, "or such other trustee," which qualification ran throughout the contract; as soon as *Holland* ceased to be trustee, his interest ceased; as soon as another

trustee was appointed, that interest was transferred to him, and the right of action to that trustee, conjointly with *Smith*.

The same objection therefore applies to the action of *Smith*, which lies to that of *Holland*, that is, nonjoinder of a person who, on the face of the contract, should have been joined. The defendants by their plea, which is admitted by the plaintiff's demurrer, show, that *Holland*, on the 1st of January, 1839, resigned the trusteeship, and that *Reuben Summers* was lawfully appointed and authorised to receive; *Summers* therefore became, by the terms of the covenant, co-obligee of *Smith*, and should have been united with him in the action; there is no survivorship here, both obligees are in being, and as such should sue.

This is not the case of a deed "*inter partes*," where the right of action would be in the parties to the deed, though the interest be in another, but like a deed poll, in which case the action enures to the party interested. *Vide Chitty Plead.*, 4 *Amer. Ed.*, *p.* 4, *in margin*. But if the court should hold the instrument to be "*inter partes*," "the trustee lawfully appointed and authorised to receive," is, in the judgment of the appellees' counsel, the co-obligee of *Smith*, and should have been his co-plaintiff.

If, on the other hand, the court should hold the right of action to be several and not joint, *Smith* should have sued, individually, for the non-payment of the moiety of the rent, and not as survivor for the non-payment of the whole.

Frick, J., delivered the opinion of this court.

The first of the above suits is an action brought by the appellant, upon the same agreement which is the cause of action, and declared upon in No. 18, (*Lahy and Counselman, vs. Nathan Holland, Adm'r of Solomon*,) and the plaintiff claims as the survivor of *Solomon Holland*, trustee of *A. M. Wilson*, to recover $300, the whole amount of rent reserved in the agreement between the parties. The breach set out in the declaration is for the whole sum, and is the sole breach alleged, and the inquiry is precluded how far it is competent for the

appellant to recover the amount of $150, expressly reserved to him in the agreement. He sues for the whole, and the sole breach alleged is for the whole, on the ground that the covenant being joint, by the death of *Holland*, the action survived to him. We have already decided in the case referred to, that the covenant of the appellees is several to each of the covenantees, and have sustained the claim of *Holland's* administrator to his proportion of the rent, and it follows that the action, in its present form by the appellant, is misconceived. He cannot recover in this action the $150 payable to him, because he sues as survivor for the whole, and he cannot recover the whole, because, under the separate covenant with him, he is not entitled, and the judgment of the county court must be *affirmed.*

In the second case the appellee is sued by this same appellant, as survivor of *Holland*, upon the following obligation endorsed upon the agreement: "I do hereby bind myself and become security, that the above named *Richard Lahy* and *John Counselman*, will perform all which on their part they are required to perform by the aforegoing agreement. Witness my hand and seal. S. COUNSELMAN, (Seal.)"

What they are required to perform, is to pay *to each of the* covenantees the sum of $150. The declaration and the breach alleged being in the same terms as in the former action, and predicated upon the basis of a joint contract, and the whole sum being claimed against this defendant as security, it follows that this action is also misconceived, and the judgment below must be *affirmed.*

JUDGMENTS AFFIRMED.

Amos Dorsey *vs.* William Whipps.—*December*, 1849.

In an action of slander, if the words stated in the declaration are not actionable *per se*, objections to the insufficiency of the declaration may be taken advantage of by motion in arrest of judgment.

Where words are *prima facie* actionable, no prefatory inducement is required, but the reverse is the case where the words do not naturally and *per se* convey the meaning the plaintiff would give to them, or if reference to some extrinsic matter is necessary, in order to their explanation.

Saying of the plaintiff, "*M A* told me, during the time he was managing for *Mr. O*, he, *A*, missed some of the plough irons from a plough, and, on going to plaintiff's shop, he there found the irons, and that he then asked plaintiff how those irons came into his shop? and plaintiff replied, he knew not, but requested him, *A*, to say nothing about it, as it would be injurious to his character," is not *per se* actionable.

Saying of the plaintiff, "I have been informed that some gentleman in the neighborhood of plaintiff had missed some clevises off his ploughs, and went to plaintiff's to have others made, and on arriving there, found his clevises in the possession of plaintiff, that he claimed the clevises, and plaintiff pretended not to know how they came into his shop, but afterwards acknowledged that he had purchased them from one of claimant's negroes, and begged him to say nothing about it, as it would ruin him," is not *per se* actionable.

No words are actionable unless they impute a crime to the plaintiff, which would subject him to punishment, and in deciding what words are actionable, the courts have shown no wish to encourage litigation.

If words are not actionable in themselves, their meaning cannot be extended by an innuendo so as to make them actionable.

If the words may be understood in a sense not criminal, there must be a colloquium in the prefatory part of the declaration, to show they were spoken in a criminal sense.

The office of an innuendo is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; it cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain.

The plaintiff having proved the words charged, and other words showing malice, the defendant, for the purpose of justifying such other words, offered, without objection, proof of matters impeaching the plaintiff's character; whereupon the latter, with a view *to rebut this evidence impeaching his integrity*, offered to give evidence that he has always been reputed, among all his acquaintances, as a man of integrity. Held: that it was error to admit this evidence.

If the slander be not justified, the law presumes the character of the plaintiff

to be good, and it has been recently decided, that evidence of character, on the part of the plaintiff, is inadmissible, whether there is a justification or not.

Appeal from *Howard District* court.

This was an action of *slander* brought by the appellee against the appellant, on the 24th of August, 1846.

The plaintiff declared, with the usual inducement of good character and innocence, in the *first count*, that in a certain discourse which the defendant had in the presence and hearing of *George W. Waters*, and of divers good and worthy citizens of this State, on the 1st of July, 1846, of and concerning the said plaintiff, he (defendant,) then and there falsely and maliciously said, &c., these false, &c., words following, of and concerning the said plaintiff, in the presence and hearing of said *Waters* and those citizens; that is to say, "*Horatio Keith* told me, during the time he (meaning the said *Keith*,) was managing for *Mr. Oliver*, that he (meaning the said *Keith*,) missed some of the plough irons from a plough, and on going to *Mr. Whipps*' shop, (meaning a blacksmith shop worked by the said plaintiff,) he (meaning the said *Keith*,) there found the irons, and that he then asked *Mr. Whipps* (meaning the plaintiff,) how those irons came into his shop, and *Whipps* replied, he knew not, but requested him (meaning said *Keith*,) to say nothing about it, as it would be injurious to his character; the said defendant thereby meaning that the said plough irons had been stolen feloniously, and received by plaintiff, knowing them to have been feloniously stolen."

In the *second*, that in a certain other discourse, defendant said, &c., in the presence and hearing of one *Worthington*, and others, "I (meaning the defendant,) have been informed, that some gentleman in the neighborhood of *Mr. Whipps*, (meaning the plaintiff,) had missed some clevises off his ploughs, and went to *Whipps* to have others made, and, on arriving there, found his clevises in the possession of *Mr. Whipps*, (meaning the plaintiff;) that he (meaning said gentleman,) claimed the clevises, and *Mr. Whipps* (meaning the plaintiff,)

pretended not to know how they (meaning said clevises,) came into his shop, (meaning a blacksmith shop worked by the plaintiff,) but afterwards acknowledged that he (meaning the plaintiff,) had purchased them (meaning said clevises,) from one of the claimant's (meaning said gentleman's) negroes, and begged him (meaning said gentleman,) to say nothing about it, as it would ruin him, (meaning the plaintiff;) the said defendant thereby meaning that the plaintiff had acknowledged that he had purchased said clevises from one of the negroes of said gentleman, and meaning further, that the said clevises had been feloniously stolen by said negro, and purchased by said plaintiff from him, knowing the same to have been feloniously stolen."

In the *third*, that the defendant further intending to hurt, &c., the said plaintiff in name, &c., and *his aforesaid trade and business*, and to cause him to be brought into great scandal and disgrace, and to subject him to the pains and penalties by the law inflicted on persons guilty of unlawfully dealing with slaves, heretofore, to wit, &c., falsely, &c., in the presence and hearing of *Wm. H. Worthington*, &c., reported, &c., of and concerning the said plaintiff, in his *said trade and business*, the false, &c., words following: (same as in the *second count;*) the said defendant thereby meaning that the plaintiff had acknowledged that he had unlawfully purchased the said clevises from the negro of the gentleman so referred to.

This last count was abandoned by the plaintiff's counsel, in argument to the jury.

The defendant filed a general demurrer, which being overruled, he pleaded *not guilty*.

1st Exception. The plaintiff having offered evidence tending to prove the speaking by defendant of the words charged in the declaration, in order to show malice, proved by *James Cook*, that the defendant had said to him that *Whipps* was in the habit of dealing with negroes in the neighborhood, and further proved that the plaintiff was, at that time, a blacksmith, and kept a shop for the accommodation of the public.

The defendant, then, for the purpose of justifying the conversation with the witness, *Cook*, proved by *Buckingham*, that

in 1843, or 1844, when witness was in the employment of the plaintiff, he heard a negro slave ask *Whipps* if he wanted to buy some crowbars, and *Whipps* said he would take them; no bargain was then made, but the negro afterwards left two crowbars at *Whipps'*. The same witness also proved, that he had known *Whipps* to purchase old horse shoes from negroes.

The plaintiff then proved, by *George Cook*, that the defendant had told him that *Whipps* was a scoundrel, and was in the habit of dealing with negroes; and when the witness cautioned him, said he could prove it, and then told him about the plough irons. And thereupon, the plaintiff, with a view to rebut the evidence as above given by the defendant, to impeach the integrity of the plaintiff, offered to give in evidence that the plaintiff had always been reputed and considered among all his acquaintances as a man of integrity; to the admissibility of which evidence, as offered, the defendant objected, but the court (Wilkinson and Brewer, A. J.,) overruled the objection, and admitted the evidence to go to the jury, and the defendant excepted.

2nd Exception. The plaintiff then proved by the witness, *Waters*, that defendant had spoken, of and concerning him, the words as charged in the first count of the declaration.

The defendant then prayed the court to instruct the jury:

1st. That the plaintiff was not entitled to recover upon the first and second counts, because the words proved are not actionable under the pleadings.

2nd. That the plaintiff was not entitled to recover under the pleadings, because the words proved are not actionable *per se*.

Which instructions the court refused to give, and the defendant thereupon excepted.

The verdict being in favor of the plaintiff, the defendant moved the court in arrest of judgment, for the following reasons:

1st. Because the words charged in the 1st and 2nd counts are not actionable.

2nd. Because the words charged in the different counts are

not so therein laid and set forth, as to entitle the plaintiff to maintain his action.

3rd. Because there is no colloquium in the declaration, showing to what the words spoken referred; and

4th. Because the plaintiff, by his counsel, having abandoned the third count, the words charged in the remaining counts are not so therein laid and set forth, as to entitle the plaintiff to maintain his action.

Which motion the court overruled, and the defendant appealed.

The cause was argued before DORSEY, C. J., CHAMBERS, MAGRUDER, MARTIN, and FRICK, J.

By WM. H. DORSEY and CHAS. H. PITTS, for the appellant, and

By BROOKES and HAMMOND, for the appellee.

MAGRUDER, J., delivered the opinion of this court.

This appeal is taken from the court in and for *Howard* district. The suit was instituted by the appellee, and is an action of slander. The plea was not guilty, and in the court below the verdict was obtained by the plaintiff.

In the course of the trial, several exceptions were taken by the defendant, and after the verdict, reasons in arrest of judgment were filed.

Several of the exceptions, as well as the motion in arrest of judgment, put to us the question, whether the words charged to have been spoken of the plaintiff by the defendant, are actionable? These we proceed to notice.

It is to be remarked, that no special damage is charged to have resulted to the plaintiff, from the alleged slander, and unless the third count form an exception, it is not alleged in the declaration, that the words spoken were spoken of the plaintiff with reference to his trade.

Since the decision of this court, in the cases of *Chaplin vs. Cruikshanks*, 2 *H. & J.*, 246, and *Sheely against Biggs*,

same volume, 363, it must be considered to be law, that if the words stated in the declaration are not actionable, objections to the insufficiency of the declaration may be taken advantage of by motion in arrest of judgment. Indeed, in the case first cited, the court went further, and refused to give an instruction, simply because, if such was the law, the defendant might take advantage of it in arrest of judgment. The reason of this was, that if the defendant would not demur because of the supposed defect in the declaration, he should not, especially if he justified, obtain a verdict simply because of this defect, and thus place upon record what seemed to be proof that the matter pleaded in justification had been proved to the satisfaction of the jury. Although a different practice has prevailed of late years in our courts, yet its propriety is not quite clear, and would not seem to justify a reversal of the court's decision in that case.

In disposing of the motion in arrest of judgment, it will be remembered, that by agreement of parties, the third count is to be considered as withdrawn.

No doubt, if the words charged to have been spoken were *prima facie* actionable, no prefatory inducement would be required. It is otherwise, however, if the words do not naturally and *per se* convey the meaning which the plaintiff would give to them, or if a reference to some extrinsic matter is necessary, in order to their explanation. In 1 *Chitty on Pleading*, 342, we are furnished with cases which illustrate this.

We do not think that the words charged in this declaration to have been spoken by the defendant, are *per se* actionable. "No words are actionable unless they impute a crime to the plaintiff, which subjects him to punishment." 2 *H. & J.*, 364. And in 1 *Starkie on Slander*, 43, it is said: "To impute any crime or misdemeanor, for which corporal punishment is to be inflicted, is actionable without proof of special damage."

All opprobrious words are not necessarily actionable. Very many words spoken of another, and which, if believed, would deprive him of the esteem of others, yet will not, *per se*, give to him a right of action. In deciding which words should be

deemed actionable, the courts have shown no wish to encourage a litigious disposition.

If, in order to supply any defect in the words spoken by the defendant, and to make him answerable for words not in themselves actionable, we are referred to any innuendo to be found in the first or second counts, it is a sufficient answer to this to say, "if the words in themselves are not actionable, their meaning cannot be extended by it, (the innuendo,) to make them actionable. If the words may be understood in a sense not criminal, there must be a colloquium in the introductory part, to show they were spoken in a criminal sense, or they are not actionable. The office of the innuendo, is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action." 2 *H. & J.*, 364. Again, "an innuendo cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain." 1 *Starkie on Slander*, 422. 4 *G. & J.*, 402.

In the first exception it appears, that the plaintiff (having, as it is supposed,) proved the words charged in the declaration, and other words spoken at different times of him by the defendant, the latter for the purpose of justifying the other words spoken by him, was permitted to offer proof of matters, certainly not within the issue.

Touching the admissibility or non-admissibility of this proof, we are not now to speak. It seems, all of it, to have gone to the jury by consent.

"Thereupon, (the exception proceeds,) the plaintiff, *with a view to rebut the evidence as above given* by the defendant, *to impeach the integrity of the plaintiff*, offered to give evidence, that the plaintiff has always been reputed and considered among all his acquaintances as a man of integrity." To this evidence the defendant objected, and because of its admission, this, the first, exception was taken. In admitting this testimony, we think that the court below erred. The character of the plaintiff was not in issue. In some courts, indeed, such evidence is admitted. There is, it must be acknowledged, a variety of doctrine upon this subject, to be found in the reported

decisions of the courts of our sister States and of *England*, and this may be mentioned as a reason why we should admit with extreme caution those opinions, "which are received from year to year, and admitted in our courts of justice, if not as rules, at least as guides for our decision."

A cardinal rule in regard to testimony is, that it must be confined to the point in issue, and correspond with the allegations. This excludes "all evidence of collateral facts, or facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute." "In some instances, however, evidence of facts, which have no apparent connection with the matter in issue, have been admitted." See 1*st Greenleaf on Evidence, part* 2, *ch.* 1. A departure from this rule is allowed in some actions of *tort*, and evidence is received, which, it is supposed, will assist the jury in ascertaining the amount of injury sustained by the plaintiff, and the amount of damages to be assessed by them. To the disregard of the rules of evidence, however, it is frequently owing that much time is wasted, and the real points to be decided by them, are lost sight of by juries. These evils should be corrected, as far as it is possible, and in regard to testimony, and what is admissible upon the question of damages, we have some excellent remarks in 2 *Greenleaf on Evidence*, "*Damages.*"

If the slander be not justified, the law will presume the character of the plaintiff to be good, and it will generally be found that it is best for him to be contented with this legal presumption. But here it was introduced, not to increase the damages, but as rebutting testimony, and ought it not to have been admitted to disprove the charges which the defendant had been allowed to introduce? Its pertinancy, when offered for that purpose, may well be questioned. It proposes to set off the opinions which his neighbors entertain of him, against what may be considered as proof of charges injurious to the plaintiff's character, and yet it only amounts to this, that his neighbors are not among his supposed calumniators.

If the plaintiff be permitted, for this purpose, to give in evi

dence the opinion entertained of him "by all his acquaintances," the defendant must be permitted to prove, by similar and other testimony, that the plaintiff has contrived to get and retain for years, in a small circle of acquaintances, a good name, to which he was never entitled, and thus he is more slandered in the court room, than he, perhaps, ever would have been anywhere else.

It is because of this mode of trying cases of slander, and of the investigation which the plaintiff himself frequently provokes, that occasion was taken to remark, that when the plaintiff succeeds in such an action, "he recovers a reputation disfigured by invective and tarnished by too much handling."

In the case of *Wagner vs. Holbrunner*, 7 *Gill*, 296, it was decided by this court, that some testimony of this description is admissible, and we are bound by the maxim, *stare decisis*, to depart, in some measure, from what perhaps would be the most correct rule upon the subject. See 2 *H. & G.*, 30. 6 *G. & J.*, 413. It is believed, however, that this court has never sanctioned the admission of testimony like this now under consideration. In 2*nd Phil. on Ev.*, 247, *(2nd edition,)* he refers to a recent case, in which it was decided that such evidence is inadmissible on the part of the plaintiff, whether there is a justification or not, and this court, in the case of *Brooke and Berry*, 2 *Gill*, *p.* 97, rejected all the evidence of character there offered as rebutting testimony. In 2*nd Starkie on Ev.*, *p.* 303, *(7th Am. Ed.,)* it is said, in civil proceedings, unless the character be put in issue by the nature of the proceeding, evidence of his character is not in general admissible.

We cannot think, that the testimony objected to in this exception was admissible.

JUDGMENT ARRESTED.

THOMAS BERRY *vs.* STEPHEN G. COX, AND MARGARET, HIS WIFE.—*December*, 1849.

A married woman, without the knowledge, privity or consent of her husband, made a parol agreement with her brother to mortgage to him certain of her leasehold property, being induced to do so by the professions of her brother, that it was an arrangement to secure her a provision, in the event of her becoming a widow. HELD: that to grant an application by the brother, for the specific performance of such an agreement, would violate the principles of both law and equity.

Appeal from the *Court of Chancery*.

The bill in this case was originally filed in the equity side of *Baltimore* county court, on the 14th of January, 1843, by the appellant, against the appellee, *Margaret*, and her then husband, *Thomas Chester*.

It alleges, that said *Thomas* being indebted to complainant upon his promissory note for $355, dated 27th of July, 1840, payable in two years, with interest from date, to secure the same, executed a mortgage to complainant of certain lands lying in *Baltimore* county. That afterwards, to oblige said *Thomas*, and at his request, complainant agreed to release this mortgage, and receive, in lieu thereof, a mortgage from said *Margaret*, or from her and her husband, of certain property about to be conveyed to the former, by one *John Davidson*. That in pursuance of this agreement, complainant released the mortgage, and in consideration of this release, and to secure said note, said *Thomas* and *Margaret*, some time in the year 1841, executed a mortgage to complainant of certain leasehold property in the city of *Baltimore*, which had been conveyed to said *Margaret* by said *Davidson*, by deed dated 28th of May, 1841, which mortgage was defeasible upon payment of the said note. That by inadvertence, complainant neglected to have this mortgage recorded until more than six months had elapsed. That through the agency of his brother he left said mortgage with said *Margaret*, who was his sister, with a view to the execution, on her part, of another similar one, which

she had promised to do. The bill then charges, that said *Margaret* had refused to comply with this promise, and had destroyed said unrecorded mortgage, and has refused to execute another. The bill then sets up an equitable lien on said property, by reason of this unrecorded mortgage, and prays for an injunction restraining said *Margaret* and *Thomas* from disposing of the same, and that it may be sold to satisfy complainant's claim, and for general relief. The *note* and *deed* from *Davidson* to *Margaret Chester*, are filed with the bill, as exhibits A and B.

The answer of *Thomas Chester*, and *Margaret*, his wife, admits the execution of the mortgage of the lands in *Baltimore* county, but denies that it was executed to secure the payment of any sum justly due by them, or either of them, or that they, or either of them, were indebted on the promissory note mentioned in the bill, but aver, that both the note and mortgage were executed without any consideration therefor, at the instance of the plaintiff, and to gratify his view, which he urged and pressed upon these defendants, of providing, in case of defendant *Thomas*' death, some resource for the defendant, *Margaret;* said plaintiff recommending such an arrangement in consequence of defendant, *Thomas*, having no relatives. They deny that this mortgage was released under any agreement or understanding, that another mortgage should be executed of the leasehold property conveyed by *Davidson*, as charged in the bill. The answer also avers, that the defendant, *Margaret*, in her own name, and without the knowledge, or privity, or assent of her husband, executed to complainant, her brother, at his suggestion of the view above stated, in her sole name, a mortgage of said leasehold property, and to secure a sum of money, the amount of which she did not recollect, but which was not due either by her or her husband to plaintiff, but was merely nominal. That said *Thomas* never assented to this mortgage, and no other mortgage of said leasehold property was ever executed. That *Peter Berry*, the brother of complainant, and said *Margaret*, delivered this mortgage, which had never been recorded, to her as coming from the plaintiff,

with a declaration that it was of no importance, and was only a matter of form; and she denies that it was even delivered to her upon any assurance, promise or understanding from or with her, that she and her husband, or either of them, would execute another mortgage of said property, and they also deny that any such promise or understanding was ever made.

A commission was then issued, under which testimony was taken, the effect of which is fully stated in the opinion. *Exhibit* M C, is the release by the complainant of the first mortgage mentioned in the bill, and is dated 26th of May, 1841. *Thomas Chester* afterwards died, and the defendant having intermarried with the appellee, *Stephen G. Cox*, the cause was revived, the latter made defendant, and the suit removed to the court of chancery.

The chancellor (JOHNSON,) being of opinion that the evidence was not sufficient to overrule the answer and the release executed by the complainant, passed a decree, on the 26th of May, 1847, dismissing the bill, from which the complainant appealed.

The cause was argued before SPENCE, MAGRUDER, MARTIN, and FRICK, J.

By ROBT. J. BRENT, for the appellant, and
By MAYER, for the appellee.

SPENCE, J., delivered the opinion of this court.

After a careful examination of the bill, answers, evidence and arguments of the solicitors of the parties, we are satisfied the decree of the chancellor in this case is correct.

It may be conceded, that the answers in this case are not responsive to the bill, and that the averment of the answer, that "said mortgage was executed by them, (the respondents,) at the instance of said plaintiff, and to gratify his view which he urged and impressed upon these defendants, of providing in case of the defendant *Thomas'* death for the said *Margaret*, said plaintiff recommending such an arrangement in conse-

quence of the defendant *Thomas* having no relations," is matter in avoidance only, and yet, from an examination of the evidence, it is clear, that this entire negotiation has been conducted by the complainant and his agent on the one side, and the respondent, *Margaret*, and her agent or friend, *Walter*, on the other side; the avowed object being and the circumstances showing the purpose to be, to provide for the defendant *Margaret*, who is the sister of the complainant.

The witness, *Peter Berry*, who seems, from his testimony, to have participated largely in this transaction, says, that the money for which the note and mortgage on the lands in *Baltimore* county were given, was given by *Thomas Berry* to deponent, for his sister, *Margaret Chester*, requesting deponent to get some security for said sum, as well as for other money before that time loaned to the said *Margaret*.

The deponent *Berry* also states, that it was understood verbally at the time it was agreed the said mortgage was to be executed between the parties, that two years' credit was to be given for the repayment of the money, and that the complainant would not trouble the defendants for the payment of their debt at the expiration of said two years, in case they were not then able to pay the same. The mortgage spoken of in this answer, was the one of the lands in *Baltimore* county which was afterwards released by the mortgagee's deed.

This witness, in his answer to the third interrogatory, says, that the defendants, *Chester* and wife, had told him that they were about trading the land in *Baltimore* county for property in the city, and that they wished complainant to release his mortgage on the land in the county, and they would renew the mortgage on the property they were about to acquire in exchange; that the deponent communicated the wish of the defendants to the complainant, which he assented to.

John Walter, a witness examined on the part of the complainant, states, that he wrote the two letters, exhibits M C, No. 2, and M C, No. 3; that the release filed among the papers marked M C, was written by him at the instance of *Margaret Chester*; that he presumes it is the same paper which

was enclosed in deponent's letter of the 22nd of May, 1841, marked M C, No. 2; he further states, that he wrote the two letters, the first dated the 22nd May, 1841, the other 25th of May, 1841, exhibits M C, No. 2, and M C, No. 3, at the instance and with the knowledge of *Margaret Chester*.

The letters of the 22nd and 25th of May, were written by the witness *Walter*, at the instance of *M. Chester*, in the first of which was enclosed the deed of release of the mortgage of the land in *Baltimore* county, and which communicated to her brother her wish that he would execute it, as she was anxious to have the matter closed between her and the other party, to wit, *Davidson*. To the letter of the 22nd of May, from *Walter* to *Thomas Berry*, the letter in which the release was enclosed, is this striking postscript: "The expenses attending the execution of the writings, I presume, your sister did not think about, and when you get your writing, that matter can be attended to; this expense you have to pay for her in *Washington*."

The witness, *Peter Berry*, in his answer to the 4th interrogatory, deposeth, that the complainant handed to deponent a paper, purporting to be a mortgage upon property lying in the city of *Baltimore*, and requested deponent, who was coming to *Baltimore* from the *District of Columbia*, where complainant lived, to get him a renewal of said last mentioned mortgage deed, as the time had run out for recording the same, and complainant directed deponent to give up said last mentioned deed to the defendant *Margaret* for that purpose; that when deponent reached *Baltimore*, he called on his sister *Margaret*, and asked her, in behalf of complainant, to execute a new mortgage and send it to complainant, which said *Margaret* said she would do. The deponent left the morgage with said *Margaret*, and he has not seen it since; that he afterwards called on *Margaret Chester* for the promised deed, but she refused to give the same. The witness *Berry* first said that *Thomas Chester's* name was signed to the deed delivered to his sister *Margaret*, but afterwards, upon reflection, said he was not positive that *Thomas Chester's* name was signed to the deed. The witness *Berry* further stated in his

answer, that he "had no recollection of seeing *Thomas Chester* at any time stated in this answer."

This witness, *Berry*, says in his answer to the defendants' cross-interrogatory, that he did, he thinks, tell them that if they would give the mortgage, it would be saving so much to her if she lived after *Chester*, or something like that.

The conclusion from all this record is, that *Thomas Berry* loaned or gave to his sister a sum of money. That for her benefit, and to secure to her, in the event of her surviving her husband, that sum, he induced her and her husband to give him a mortgage on the lands in *Baltimore* county. That subsequently, *Chester* and wife wished to sell or exchange the land in *Baltimore* county, for leasehold property in the city of *Baltimore*. *Thomas Berry*, for the benefit of his sister, agreed with her to release his mortgage on the land in *Baltimore* county, to enable *Chester* and wife to sell the same or to exchange it, and that *Margaret Chester* should give the complainant a mortgage on the leasehold property, to be assigned or conveyed to her. This arrangement was carried into execution, *Thomas Berry* released his mortgage, the leasehold property in the city was conveyed to *Margaret Chester*, and she executed the mortgage on said property to her brother, the complainant, which he accepted. The complainant omitted or neglected to have this mortgage recorded according to law. About one year after this mortgage was executed by the respondent *Margaret*, the complainant sent it by his brother and witness, *Peter Berry*, to get her to renew it, and *Peter Berry* states that she said she would do so, but that she afterwards refused to renew said mortgage. The witness says, that at the interview with his sister, when she promised to renew the mortgage, her husband, *Thomas Chester*, was not present, and that he did not see him.

This then is the parol agreement which this bill asks a court of equity to decree shall be specifically performed. An agreement made with a married woman, without the knowledge, privity or consent of her husband, induced by professions of a brother, that it was to secure to her a provision in the event of

her becoming a widow. We offer no argument for refusing such an application, because to grant it, would violate the principles of both law and equity. The decree of the chancellor is affirmed, with costs.

DECREE AFFIRMED.

JOHN KETTLEWELL *vs.* DAVID STEWART.—*December*, 1849.

In this case, the court, CHAMBERS, SPENCE, and MAGRUDER, J., against the opinion of MARTIN and FRICK, J., who dissented, and contrary to the decision in the case of *Albert and wife, vs. Winn and Ross*, 7 *Gill*, 446, sustained the validity of a deed conveying to a trustee all the grantor's property, in *trust*, to sell the same, and apply the proceeds, 1st. To the expenses of executing the trust and commissions to the trustee. 2nd. To the payment of a certain mortgage on the property. 3rd. To or towards the payment of the claims of all creditors who, within thirty days, should assent to the deed, and execute releases to the grantor of their claims And 4th. To apply the balance, if any, to the payment of the claims of all other creditors than those therein provided for, rateably and proportionably.

Appeal from *Baltimore* county court.

This was an action of *trover*, brought by the appellee, on the 23rd March, 1846, against the appellant. The plaintiff recovered judgment in *Baltimore* county court. He claimed title under a deed executed to him on the 29th January, 1846, by *George Suter*, in consideration of $10, to various parcels of real, and articles of personal property. This deed was in trust, that *Stewart*—

1st. Would sell and dispose of the property conveyed to him.

2nd. To apply the proceeds to payment of all costs, &c., attending the execution of the trust, and five per cent. commissions to the trustee.

3rd. To the payment of a mortgage debt and interest, on a part of the real property conveyed.

4th. Towards the payment and satisfaction of the claims of all such of the creditors of the said *George Suter*, who may, within thirty days after the date of this deed, assent to the terms of this assignment, and execute a release to the said *Suter* from all liability on account of their respective claims against him, that is to say, rateably and proportionably, if the fund be insufficient to discharge the whole, or to the payment in full of said claims, if the same be sufficient for that purpose.

5th. If any balance or surplus should remain in the hands of the said trustee, to appropriate and apply the same to the payment, rateably and proportionally, of the claims of all the creditors of the said *George Suter*, other than those hereinbefore provided for.

6th. The trustee to be answerable only for wilful neglect or omission.

The defendant, *John Kettlewell*, was the sheriff of *Baltimore*, and had seized and sold the property declared for, under a writ of *fieri facias*, issued on the 27th May, 1846, by the *Bank of Westminster*, upon a judgment they had recovered against *George Suter*, on the 26th November, 1845.

The county court (PURVIANCE, A. J.,) was asked by the defendant to instruct the jury, that the deed under which *Stewart* claimed, was not a valid deed, to transfer to him the property mentioned in the declaration; and that he was not entitled to recover, which instruction was refused. The defendant appealed to this court.

The cause was argued before CHAMBERS, SPENCE, MAGRUDER, MARTIN, and FRICK, J.

NELSON, for the appellant, submitted the case on a brief printed statement, presenting as the only point involved, that the deed from *Suter* to the appellee, was void under the *Stat. 13 Eliz., ch. 5*, because of the preference it affected to give to the creditors of the grantor, who would consent to release him over all other creditors who would not assent to such terms. He referred to the case of *Ubert and wife, vs. Winn and*

Ross, since reported in 7 *Gill*, 446, as conclusive of this question.

McMahon, for the appellee, denied that the fate of this appeal necessarily depended on the solution of the question submitted by the counsel for the appellant. There were other points on which the appellee might rely for an affirmance of the judgment of the court below; which points the learned counsel briefly explained. But he was prepared to discuss the general question involving the validity of the deed as a conditional performance. If the question was not settled by the decision in *Albert vs. Winn*, referred to by the other side, he would ask permission to express his views on the subject.

After a brief consultation on the bench, the presiding judge said, that the general question was interesting and important, involving the validity of many transactions, and bringing into question, perhaps, many titles. Under all circumstances, the court thought the decision in the case referred to, ought not to be treated as conclusive against the validity of conditional preferences. The court would, therefore, receive written arguments of counsel on the general question, in the hope that, with the aid of further discussion, the court might be able to pronounce a judgment which might serve as a guide in all future cases. In consequence of this intimation, the following argument was submitted by

McMahon and Alexander, for the appellee:

We shall assume, for the purpose of this argument, that the debtor, in making the assignment, had no purpose of actual fraud in contemplation; and that the deed contained no provision calculated, by its tendency, to hinder or delay the application of the debtor's estate to the payment of his debts. The question, then, will be, whether fraud, which is to avoid the deed, is to be inferred as a conclusion of law, from the clause which requires the creditor, who would avail himself of the preference, in consideration thereof, to release his claim to the debtor?

Now we may assume it as settled in *Maryland*, that a debtor, in failing circumstances, may prefer one or more of his creditors, at his pleasure. *State of Maryland vs. Bank of Maryland*, 6 *G. & J.*, 205. And the preference may be given by a deed assigning all the debtor's estate, in trust, to provide for payment, in the first place, of the preferred creditors; and in the next place, of all other creditors. The effect of such assignment, is to delay and hinder creditors, by defeating the lien of judgments subsequently recovered, and disappointing executions subsequently issued. But, in view of the object of the assignment, and of the remedy which equity supplies for administering the trust, such transfer of jurisdiction is held not to be fraudulent. In *Pickstock vs. Lister*, 3 *M. & S.*, 371, (which is referred to by this court in terms of approval,) the assignment was supported at law, although it was for the purpose avowed, of disappointing a particular creditor, who was about to issue his execution. See, also, *Riches vs. Evans*, 9 *Car. & P.*, 640, to the same point. We may safely conclude, therefore, that a deed whereby one or more creditors are preferred absolutely and unconditionally to others, is not to be avoided as fraudulent at common law, or under the *Stat.* 13 *Eliz., ch.* 5.

The question, then, must be, may a debtor, in circumstances which authorise him to make an absolute preference, annex conditions to be performed or assented to by the creditors intended to be preferred? We submit, that if the debtor had previously hypothecated parcels of his effects to particular creditors, he might, in a deed assigning all his property for the equal benefit of all his creditors, provide, that the creditors who were already secured, in part or in the whole, should come in only on condition that the effects hypothecated to them should be abandoned, for the benefit of the general fund. Or he might provide, that the creditor, surrendering his particular security, or waiving his remedy against parties standing in the relation of surety to the debtor, should, in consideration of such surrender or waiver, be preferred over all others. If these positions be conceded, it will result, that a preference is not necessarily

fraudulent, because it is conditional in its form. And the objection resolves itself into an objection against the specific condition requiring a release from the creditor to be preferred as a consideration for the preference.

But we have already stated, that the right of the debtor to create preferences amongst his creditors, is uncontrollable. No court will inquire into the motive for the preference. He may prefer one in gratitude for past kindnesses, another in expectation of future assistance, and a third in fulfilment of a previous agreement, that the creditor shall accept the preference in full satisfaction of his claim. But, if he is at liberty to treat with one, and another, and every of his creditors in succession, for a relinquishment of his or their claims against him, and if an assignment made in execution of such agreement, is good against his unpreferred creditors, why may he not, in the absence of a preliminary agreement, assign to any one of his creditors, on condition expressed, that such creditor shall release the debtor from the obligation of his contract? And why may he not annex to his assignment the further condition, that another creditor, on executing a similar release, shall share in the preference? It is understood, indeed, that no objection is made to the power of the debtor to prefer one or more of his creditors, by name, on any terms which he or they may see fit to accept. The objection is to his right to prefer creditors indefinite in number, and distinguished only by their acceptance of prescribed conditions.

Now we ask for the legal evidence upon which the distinction supposed is to be rested. The burden of the argument is upon those who affirm its existence, and their arguments must be consistent with the right of the debtor to prefer absolutely—to annex other conditions to his preference—to require a release as the consideration for a preference to one or more creditors by name. But we shall not rest our case on the absence of argument on the other side. Nor shall we consume time in the effort to show that the distinction is unsubstantial and may be resolved into a matter of form. But, addressing ourselves at once to the usual case of a deed to trustees, preferring all cre

ditors who shall release their claims, we shall endeavor to show that, upon legal principles, such deed, if obnoxious to no other objection, ought to be sustained.

The direct argument in favor of this proposition, may be compressed within a very narrow compass. The deed annexing conditions to the preference intended, will be good as against those creditors who accept its terms. As between them and the debtor, it rests on a legal and valuable consideration; and by their giving the releases required of them, the preference, so far as they are concerned, becomes absolute. Can the unpreferred creditors justly object, that the debtor has thought fit to annex a condition to a preference in favor of another, which preference might have been given in absolute terms? Is he, by reason of the condition, placed in a worse condition than he would have occupied if the preference had been originally absolute? It is easy to show that the condition is, on the contrary, for his advantage. It is made uncertain, whether the preference will be accepted on the terms proposed; he has an opportunity, by accepting the condition, of placing himself on an equality with the most favored creditor; and, in any event, a compliance on the part of the creditors accepting the preference with the condition of release, by reducing the extent of the debtor's liabilities, increases his prospective ability to pay his remaining debts. *Chief Justice Gibson*, in *Thomas vs. Jenks*, 5 *Rawle*, 225, rightly affirms, that the arbitrary control over the order of payment of his debts, which is allowed the debtor by the common law, and is not restrained by the *Stat.* 13 *Eliz.*, and which suffers him to postpone any creditor to the rest, "makes participation of the fund, before those he may choose to prefer are served, not so much a matter of right as of favor. To let a creditor in among the first, therefore, though on condition that he release the unpaid residue of his debt, may be to him a favor, instead of a wrong, which may consequently be extended to him on terms, or not at all. Having an unquestionable power of preference, of which he is the absolute master, it follows that he may set his price on it, provided it is

not a reservation of part of the effects for himself, or any thing that would carry his power beyond mere preference."

But the argument in favor of the debtor's right to stipulate for releases from the creditors to be preferred, receives additional strength from the views expressed by his honor, *Judge Chambers*, in delivering the opinion of this court, in the case of *Somerville vs. Brown*, 5 *Gill*, 422: "Our whole system regulating the relation of debtor and creditor, is designed to subject every dollar's worth of property, real, personal and mixed, to the just claims of a creditor, and to exempt the honest debtor, who does surrender all such property, from the grasp of a relentless creditor, who might desire to imprison his person, or weigh down his future energies by the impending burthen of his debts." The debtor must surrender up all his property; he must reserve no beneficial interest therein for himself; he must embarrass its surrender with no unusual provisions, to delay or hinder its speedy application in payment of his debts. The creditor has a right *to every dollar's worth* of the property which the debtor is then possessed of. But the law denies his right to incarcerate the person of his debtor, or to *weigh down his energies* by seizing on all his future earnings. Such is the policy of our law, and a policy less humane could not be tolerated by a system of jurisprudence, which boasts that its ethics are derived from a religion that inculcates the duty of forbearance in the exercise of our rights, by reminding us continually of our need of forbearance at the hands of a common Superior.

To deny the right of the debtor who surrenders up his all to a discharge from the obligation of his contracts, is, therefore, to contravene the policy of our laws. It is to attribute to the creditor rights, and to suppose that he is bound to no correlative duties. Hence it is, that the effort made by the honest debtor to protect his person from confinement, and to place himself in condition to resume his business, is denounced as an attempt to coerce the creditor. But when we enquire, what is the object of the coercion which is so much reprobated? the reply must be, to oblige the creditor, otherwise relentless, to extend to his unfortunate debtor that indulgence for which, in the impressive

language of *Chief Justice Marshall*, in 1 *Peters*, 615, "humanity and policy plead so strongly, that in every commercial country known to us, (but our own,) the principle is established by law." And when it is asked, by what process is that coercion sought to be effected? the answer is, by the exercise of that power of preference which, in mercy to the unfortunate debtor, the common law refused to control.

Thus we perceive, that the debtor, in exacting a release from his creditor as the condition for the surrender of his property, exercises his unquestionable right to prefer, in advancement of the policy, which the law, from motives of humanity, has established. Adopting, again, the language of *Chief Justice Marshall*, "this certainly furnishes a very imposing argument against its being deemed fraudulent." Nor is the coercion which is exercised over the creditor, through the instrumentality of a deed executed, comparable in intensity and injustice, with that coercion which a debtor familiarly exercises in chaffering with his creditors for a composition, holding his property all the while as a lure to the more facile, and as a weapon of threatening against those who would, otherwise, be less manageable. Deeds of composition are universally supported; and agreements for a composition have been enforced in equity, and recognized at law. But it would be very difficult to sustain those adjudications upon the hypothesis, that a debtor, in creating a preference, may not stipulate for an advantage to himself. Every deed and agreement for composition, contemplates advantage or benefit to the debtor.

We are unable to find any case, at all venerable for antiquity, in which such limitation on the right of the debtor to prefer, is maintained; and if such limitation exists, it must be acknowledged that it is one of modern origin. Far be it from us, to question the duty of the debtor to fulfil his contract to the extent of his ability. We affirm, simply, that the obligation which he contracts with his creditor, does not supersede the duty which he owes, perchance, to a family dependent on him for subsistence, and to society. And the moral, social and commercial ameliorations which *England* has experienced,

under the beneficent influence of her bankrupt system, would serve to convince us, if otherwise incredulous, that sound policy and sound morals are not inconsistent with the denial, to the creditor, of the privilege of treating misfortune in trade as a crime, which is to be expiated only by perpetual imprisonment.

Assuming, then, the soundness of the policy which assures to the debtor, upon surrender of his whole estate, an immunity from imprisonment, and the enjoyment of his future earnings, our sole enquiry should be, whether there is any mode of affording to him that remedy less exceptionable than the exercise of his power of preference? That evils may result from its exercise, is admitted. The same may be predicated of every power. It is sufficient praise of any principle, that, on the balance of good and evil flowing from its practical application, the good predominates. The arbitrary exercise of the admitted right of absolute preference, is frequently the cause of rank injustice. But the power of preference exists. When it is shown, therefore, that evil consequences flow from the toleration of those conditional preferences, the argument, to be rendered effective, must further prove that those evils are greater than the evils which were designed to be remedied; or, that some other remedy exists, which may effect equal benefits with consequences less injurious.

Does any other remedy exist? It is said that the insolvent laws afford sufficient protection to the debtor, and that the allowance of conditional preferences enables the debtor, in the administration of his estate, to substitute his own will for the more equal, summary and effectual rule of distribution, which is provided by the law, and to avoid that searching scrutiny into his affairs, and the causes of his inability, which are indispensable to guard against a fraudulent debtor.

This objection to such deeds, it will be seen, necessarily concedes, that the debtor, dedicating all the property he then has to the payment of his debts, and annexing only the condition, that such total surrender shall release him for the future, by proposing such a condition, exacts nothing that is wrong or fraudulent on his part; but, on the contrary, only proposes

what the insolvent laws, themselves, accomplish more effectually and justly for all parties. The purposes and policy of our insolvent system are too obvious to require comment. Their manifest aim and end is, the release of the person and future earnings of the debtor; not only from a feeling of humanity to the debtor, but also upon principles of public policy, founded on the interest which society has in promoting the happiness and stimulating the industry of all its members. And if the benign purposes of this system were, in fact, accomplished by its practical operation, there would be some force in this objection; although, even then, it would, as it seems to us, be difficult to maintain, that the debtor, seeking the same ends by the condition he proposed, was guilty of a fraud. It so happens, however, that our insolvent system, in consequence of the limited authority of the State government, is incompetent to accomplish the leading purposes which it had in view, "the equal distribution of all the property of the debtor amongst all the creditors, and the discharge of the debtor from *all* his debts." It cannot be doubted that these were the designs, and were expected to be the results of this system when it was first established. But so soon as it was decided that, under the provisions of the constitution of the *United States*, the insolvent laws of the State could have no operation upon the *foreign* creditor, these designs were, in a great measure, subverted, and it has become, by its practical operation, a system which prefers the foreign at the expense of the domestic creditor, and, at the same time, leaves the debtor entirely at the mercy of the foreign, whilst it discharges him from the domestic creditor. And thus, whilst it substantially gives the foreign creditor a preference as to the property the debtor then has, and still leaves the person of the debtor, and all his future property, exposed to the prosecution of such creditor, it at the same time, whilst it postpones the domestic creditor, wholly discharges his debt. So that the very creditor, from whom alone any consideration in the eye of this system proceeds, the creditor from whom the debtor is discharged, is the creditor postponed, and oftentimes wholly excluded from all participation in the debtor's effects.

A mere reference to the decision of this court, in the case of *Larrabee vs. Talbot*, will illustrate these results. The debtor, no matter what his condition of insolvency, may prefer the foreign creditor, or distribute all his property by such preferences, and the system cannot reach them, or affect his right to a discharge from his domestic debts. And, as the insolvent laws of the State are incompetent to release from the foreign claimant, and the preference of such claimant is not illegal and improper, their result, instead of equal distribution, is only to tempt the debtor to the preference of the foreign claim. Again, it is settled, that no transfer of the debtor's property, by operation of the insolvent laws, consequent upon the debtor's application for the benefit of them, can affect the foreign creditor's right to pursue that property even into the hands of the trustee appointed under his application. And hence the insolvent laws, even after the application of the debtor, and the appointment of his trustee, are incompetent to put the foreign creditor to his election, whether he will come in and partake equally of the property, on condition of the discharge of the debtor, or keep out and retain his rights and remedies unaffected by the application.

In view of these, the actual results of the system, we are, then, certainly justified in saying, that whilst our laws, by the adoption of this system, acknowledge and establish the policy and justice of the proposition, "that the debtor, surrendering all he has, should be released," they utterly fail in their operation as to their two great objects, "equal distribution of all, and discharge in consideration of it." And we might add, that so far as the *home* creditor is concerned, and, perhaps, the *debtor* too, it were better that the system, as tending to defeat its own purposes, were abolished, if some mode of accomplishing these objections cannot be constitutionally introduced as a part of the system. Certain it is, as it seems to us, that it affords no such relief to either party, debtor or creditor, as it contemplated, and no such substitute for the debtor's power of making terms with his creditors, as ought to disarm him of his common law power of preference, when exerted for no other purpose than that of

future release, in consideration of the surrender of all the property he has any title to, or can convey. And it is only by the instrumentality of such deeds as the present, that the policy embalmed in our insolvent system, can be carried out, and by the aid of an acknowledged common law right, which conflicts with no provision of the constitution of the *United States*, and which, whilst it leaves every creditor free to elect or reject at his pleasure, ensures to the creditor all the debtor has, and equality in participation of it, on no harder terms than those of future release. Nothing that the insolvent laws can do, can force the foreign creditor either to discharge, or come in and take his equal dividend. But, by these deeds, the option is presented to him, of placing himself on the same platform with the home creditor, or, if he declines this equality, of retaining all his rights and remedies, for the future, unimpaired. And, upon principles of justice, his exclusion, if he seeks more than equality, can hardly be condemned as *fraudulent*, whilst, at the same time, the prospect of present exclusion tends to promote the other great object of the law, in the release of the debtor from pecuniary thraldom. And, as to the domestic creditors, it is manifest that the effect of such conditional deeds is highly advantageous, by promoting and securing an equal and, therefore, equitable distribution amongst all, and giving them some consideration for discharge, where, otherwise, they are, by law, subject to the discharge, and may, at the same time, be excluded from any share of the present property of the debtor, for the benefit of other creditors, who, whilst they are preferred as to the present possessions of the debtor, retain their rights unimpaired for the future, so far as their claims are undischarged by the property the debtor then has.

This objection, as we have already remarked, concedes, that so far as the object of these deeds is, to obtain the release of the person and future earnings of the debtor upon a fair surrender of all the property he has, it is, in the eye of our law, a proper object, but that it is one, for the attainment of which it is not necessary to sustain such deeds, because it is one which is more happily and more justly arrived at, by leaving the debt-

or's effects to administration in insolvency. This capacity of our insolvent laws to bring about the same results, if admitted, would not, as has already been said, demonstrate that there would be any fraud on the part of the debtor, in attempting to arrive at the same results by his own voluntary act or deed. It can never be a fraud upon the law to carry out purposes, which the law itself not only recognises as proper, but which it also makes the basis of its own action, whenever it assumes the administration of the insolvent's effects, and, therefore, if it were even admitted that under the stern principles of the common law, as it existed before the introduction of bankrupt or insolvent systems, there might be some objection to the debtor's requiring a discharge on such terms, it ceases the instant the law itself is so modified as to make a concession of the same terms of discharge a just ingredient in the obligations of contracts. At the common law, when unmodified by bankrupt or insolvent systems, the person and property of the debtor were forever exposed to the prosecution of the creditor, and nothing but the grave could shut him out from the pursuit of the person. Yet, even under that, as will be seen by the convincing decisions of the *English* courts, hereafter referred to, the law, from principles of humanity, tolerated the debtor in making his discharge a condition of his conveyance. But when the law itself adopts the right of discharge as a rule for its own government, in its control over the relation of debtor and creditor, all pretence of fraud upon the law must cease, and the debtor asking such discharge, instead of exercising a right connived at or barely tolerated, is now acting under and in obedience to the policy of the law. It is the peculiar excellence of the common law, that it consists of a system of principles, which contract or expand, to meet the changes in the condition or institutions of society, and which are susceptible of ready adaptation to its ever varying exigencies. As is justly remarked by *Lord Mansfield*, (1 *Durnf. and East.*, 8:) "As the times alter, new customs and new manners arise, these occasion exceptions, and justice and convenience require different applications of those exceptions within the principle of the

general rule." And again he says, *(3 Douglas, 373:)* "As the usages of society alter, the law must adapt itself to the various situations of mankind." And it cannot therefore be doubted, that where the law, as modified by bankrupt or insolvent systems, has declared the debtor's right to a discharge upon a fair surrender of his property, the debtor, in the eye of the law, commits no fraud in exacting such a discharge in his voluntary conveyance of all: and when, as we have already shown, the insolvent system, from causes beyond its control and beside its intent, fails to accomplish that which it aimed at, it is still more manifest that the debtor, seeking by his voluntary deed to arrive at the same results, and, in a great measure, accomplishing by it what the law utterly fails in, instead of committing a fraud, is rather to be regarded and favored as ministering to the purposes of the law.

But it is further objected, that in cases of discharge under the insolvent law, the creditor is entitled to the right of recourse to the debtor's future acquisitions, by gift, devise, descent, or in a course of distribution, which right is lost or surrendered by releases exacted under such deeds as the present. So far as such deeds aim at the release of the *debtor's person and future earnings*, this objection concedes that there is no fraud, and as we have already remarked, such a release is in accordance with the settled policy of the law in this State, and may rightfully be demanded upon the terms of a total surrender of his property. And then it comes round to the question, "is the exaction of the release fraudulent under the *statute of Elizabeth* or at common law, because, by the surrender of the debt, the creditor loses the power of proceeding in future, not against the property which the debtor then has, or can they convey (for that is conveyed,) but against property, which, by possibility, the debtor may thereafter acquire by the bounty of others or the bounty of the law, and to which, at that period, he has not a shadow of title?" Of such interests it is to be observed, that they are what the law terms "naked possibilities," and are not recognised by the common law as interests at all, so as to be assignable in any mode, or as incapacitating

the party as a witness because of interest. They are, in other words, mere expectancies, or hopes of gift or succession, which in the eye of the common law, constitute no present or vested title, right or interest whatever, which the debtor could convey. Nor are they interests, which the deed in the present case operates upon *by way of conveyance*, and it would seem to us to be almost a solecism in term, to say that a deed is to be held fraudulent and void, as *a fraudulent conveyance* of property at the common law, only because the release of the debt may prevent a possible recourse to an expectancy which the common law considers at the time of making the deed, as no right, title or interest whatever, and which the deed itself cannot convey, and does not profess to convey.

On this subject, we beg leave to refer to the language of the court, in 5 *Rawle*, 226, where that eminent judge, *Chief Justice Gibson*, whilst holding that the debtor, if he exacts a release, must convey all his property, remarks: "But why, it may be demanded, shall not the debtor be suffered to stipulate for a part of the property, as well as for the exemption of his person and future acquirements? The answer is, that the statute, by which alone any stipulated exemption is prohibited, *looks but to property which may be the subject of present assignment.* It protects the creditor's recourse to the property conveyed, by avoiding all conveyances that would delay, hinder and defraud him of it, without, however, *protecting* his recourse to anything else, because the assignment cannot operate on anything else." The point of these remarks is obvious; the *statute of Elizabeth*, (which is but in affirmance of the common law,) had reference to conveyances and assignments creating a delay and hindrance by passing such interests as were *then assignable*, and were in fact assigned by the deed objected to, and not to mere possibilities or expectancies, such as a possible donee, heir, devisee or legatee, might thereafter acquire by gift, devise, descent, or in a course of distribution. The statute has reference to *conveyances* made to hinder and delay creditors in the collection of their debts, and *to such interests as a conveyance may pass*, and not to mere expectan-

cies, which are not the subject of assignment. The *conveyance objected to in this case, does not and cannot be pretended to pass any such expectancies*, and, therefore, does not, as a mere conveyance, put them out of the reach of the creditor. Their future exemption, if they fall in, only results from the creditor's agreeing to release his debt, and the mere incidental result of it in working a surrender of *a possible recourse at some future day to a possibility*, could hardly be regarded as a fraud within the contemplation of this statute. The fact that the insolvent laws may save these expectancies for creditors, does not prove that the required surrender of them by the surrender of the debt, is therefore a fraud under the *statute of Elizabeth*. The single question is, "does the common law or the *statute of Elizabeth* hold a conveyance fraudulent and void, which in fact conveys and dedicates to the use of the creditors, all the property to or in which the debtor has then any right, title or interest, or which he can convey, in consideration of a release, merely because that release might surrender a possible recourse to a mere expectancy, which, at the period of the release, is not a right, title or interest known to the law?" And we submit, that such a possible result does not constitute a fraud under either.

And we may here add with reference to the *practical* value of this objection to such releases, that in fact it seldom, if ever, surrenders anything; for so long as it is shown that such gifts, devises, &c., if made, will fall within the grasp of the creditor, this very knowledge prevents the making of them, and they are made to others of his family, or so covered as to elude observation. The surrender, in effect, at the time when it is made, takes nothing from the grasp of the creditor which belongs to the debtor, or will probably ever belong to him whilst he remains such a debtor.

Having thus explained the grounds on which we presume to think that a debtor, upon principle, may, in a conveyance of all his property, prefer such of his creditors as will release him from payment of their debts, we proceed next to show that such assignments are equally sustainable by authority. In the pro-

gress of our researches in *English* books, we have discovered no case in which the validity of such conditional preferences has been doubted by the court, and only one in which they have been questioned in argument. Compositions between the debtor and his creditors, are of very frequent occurrence, and they rest on the acknowledged right of the debtor in surrendering up his property, to stipulate for advantages to himself. The numerous cases in which compositions have been enforced, constitute a part of that "uniform current of *English* decisions" which the present chief justice of the Supreme Court relies on as sustaining the validity of those conditional preferences.

There are, also, cases in which the validity of the preferences is affirmed. The *King*, in aid of *Braddock vs. Watson*, 3 *Price*, 6, is a case of this description. This has been characterised as a *bald case*. But the report leaves no difficulty in ascertaining the material facts which were presented, the questions which were discussed, or the grounds of the decision. The defendant's plea, which was admitted by the demurrer, states that the assignment was of all the debtor's estate, in trust, for the benefit of all his creditors, but contained a proviso, that in consideration of said assignment, the creditors should take the same, and the moneys to arise therefrom, "in full satisfaction and discharge of their several and respective debts then due and owing to them, and release the said debts then due and owing to them, and release the said debtor therefrom." It was, no doubt, the original design, that all the creditors should concur in this deed. But it is expressly stated, that several creditors, including *Braddock*, had refused to execute it. The plea averred, that the debts due to the assignees and other creditors, who had executed the deed, exceeded, in amount, the value of the property assigned. And the defence rests on this ground.

The counsel for the plaintiff insisted, that the "assignment was fraudulent under the *Stat.* 13 *Eliz.*, as against *Braddock*, and might, therefore, be avoided by him." This was the more strongly pressed "from the fact of there being inserted in the assignment a condition to be imposed on all who should entitle

themselves to benefit under it, by signing it, that they should release the debtor from the rest of their demands, in consideration of such dividend as they should receive." The court declared: "There is certainly no fraud in this case, affecting the assignment which has been made for the equal benefit of all creditors, *Braddock* as well as the rest." This is a very "common arrangement, which it would be very injurious to disturb." And *Richards*, *Baron*, after explaining the case of *Pickstock vs. Lyster*, 3 *M. & S.*, 371, added: "Such a deed certainly ought not to be avoidable by any particular creditor not attempted to be excluded from the benefit of it; *and no such attempt has been made in the present instance.*" The tender of a preference, on condition that the creditor will release, is not an attempt to exclude him from the benefit of the assignment. Here, then, we have a case in which the facts, as pleaded, present the very issue. The question raised on the validity of those conditionat preferences, is earnestly discussed, and it is directly met and decided. But the court did more than decide the question. It is declared, that the deed in this form "is a very common arrangement." And the counsel, himself, argues chiefly from the special circumstances, as if conscious that the general question had been settled by the common consent of the profession against him. Amongst other arguments urged, it was insisted, that the condition operated "to compel the creditor to accede to a composition which the bankrupt laws could not force him to submit to. A creditor may object to sign a bankrupt's certificate, whereby he keeps his future effects liable." This argument failed of effect, and would be wholly misplaced in *Maryland*, where the discharge is a full protection to all future acquisitions.

The question was again presented in the case of *Owen vs. Body*, 5 *Ad. & Ellis*, 28, (31 *Eng. C. L.*, 254,) and the manner in which the question is discussed and determined, confirms us in the inferences which we have deduced from the preceding case of the *King vs. Watson*, that the common opinion at *Westminster* is fixed in favor of the validity of those conditional preferences. The assignment was made by an inn-keeper, of

all his effects, including his interest in the house, for the equal benefit of all his creditors who would execute the deed, and "accept and take the dividend or dividends, to arise and be produced out of and from the said goods, and chattels, and effects, in full satisfaction of his debt." The deed likewise authorized the trustees so long as they should think it desirable and advantageous to do so, to "continue and carry on the business" of the grantor in the deed for the benefit of the creditors. The deed was executed by the trustees and two other creditors, but not by the defendants, who were also creditors. The trustees entered into possession, and continued the business through the agency of the grantor. The defendants recovered judgments against the grantor, and laid their executions on the goods. On their part it was insisted, that the deed was not valid as against the creditors who had not executed it, "being only a transfer of it to the intent that the parties executing it, might carry on the business of partners;" and in the argument in reply, their counsel insisted, that it was not "a *bona fide* assignment within the authority of *Pickstock vs. Lyster*, because the goods were not conveyed for the direct object of their being converted into money, and applied in satisfaction of the debts, *but to be traded with.*" It was "an assignment on speculation." "In the case of a regular assignment, the creditor coming in, entitles himself to a dividend, and runs no risk. But here, such a creditor would be a partner with the trustees, taking the profits of the hotel, liable for the debts incurred in carrying it on, and, perhaps, even subject to the bankrupt laws." *Lord Denman*, after the argument, stated that the question discussed was very doubtful, and the court would take time to consider it. At a subsequent day, he delivered the opinion of the court, which was adverse to the validity of the assignment. "The deed imposed such terms as might have constituted a partnership among the persons executing it; and *those* were terms to which the creditors were not bound to submit." It is hardly possible that the counsel and the court could have overlooked the fact, that the assignment preferred creditors who should execute releases to the debtor. The only inference which occurs to us.

is, that the conditional preference, *per se*, would have been deemed lawful.

In *Tatlock vs. Smith*, 6 *Bing.*, 339, (19 *Eng. C. L.*, 94,) an agreement had been entered into between the debtor and his creditors for a composition. A deed was prepared and presented to the debtor; but he refused to execute it, objecting to the sufficiency of the release therein. The plaintiffs, being creditors, thereupon commenced this action against their debtor, insisting that the failure of the debtor to execute the deed, avoided the agreement. The court held, that the deed tendered was not in proper form, and the defendant's objection was, therefore reasonable; that, in any event, the action was premature, as the defendant could not be put in default until the deed had been executed by all the creditors, and, in this form, tendered to him for execution; and (which is the material point,) that the agreement, having been in part performed by the debtor, was binding on all his creditors who had entered into the agreement. Upon this case, we would respectfully remark, that if the conveyance of the debtor's estate in trust for creditors who assent to certain terms prescribed by him, would be fraudulent and void, as against the policy of the *Stat.* 13 *Eliz.*, *ch.* 5, or at common law; an agreement for a composition on such terms, so long as it remains executory, ought not to be respected or enforced, even as against the creditor who had, under the influence of undue coercion, assented thereto. The principle undoubtedly is, that an agreement is not to be executed which, when executed, will be set aside as fraudulent against other persons. Nor is there any equity in favor of the debtor arising out of the fact, that he has surrendered a part of his effects in part performance of such agreement. We infer, from the court's opinion, that the object contemplated by the agreement, does not contravene the policy of the law; on the contrary, that the debtor may legally exert the influence which his control over his property secures to him, in order to coerce his creditors into reasonable terms of composition.

Without troubling the court with references to other cases in which the judgment of the court necessarily assumed the va-

lidity of those conditional preferences, we may content ourselves with the broad assertion, that "there is no case to be found in the *English* books in which a contrary opinion has been expressed by the court, or (if we except the case of the *King vs. Watson*, already alluded to,) even by counsel in argument."

Admitting, then, that the more recent *American* cases are in a state of distressing conflict with each other, we will proceed to show that, in the language of the present chief justice of the Supreme Court, in *White vs. Winn and Ross*, "The weight of judicial authority, in this country, is in favor of the right of the debtor, (in the absence of any bankrupt or insolvent law,) by a conveyance, devoting his entire estate to the payment of his debts, to prefer creditors who will consent to release him from these claims, to other creditors who will not accept such terms."

"Such are the conclusions of the late *Chancellor Kent* and *Justice Story*, whose concurrent opinions on those subjects (and may we not add, on all legal subjects?) deserve the highest considerations."

In 2 *Story Eq.*, *sec.* 1039, it is stated, as a general conclusion from the cases, that priorities and preferences, by debtors, in favor of particular creditors, "are not deemed fraudulent or inequitable; and even a stipulation on the part of the debtor, in such an assignment, that the creditors taking under it shall release and discharge him from all their future claims beyond the property assigned, will, it seems, be valid and binding on such creditors."

The learned author sustains his text by referring, amongst others, to the case of *Hasley vs. Whitney*, 4 *Mason*, 207, decided by him early in his judicial career. The influence of this case, as authority, is supposed to be lessened by the admission of the judge, in page 230, "that if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my (his) mind would be against the validity of them." It seems to have been overlooked, that, in the same paragraph, he declares, "that the weight of authority is in favor of the stipulation," and that he

yielded to that authority "*without reluctance.*" As *res nova*, the inclination of his mind would have been in one direction. In fulfilment of one of the first duties of the judge, he was obliged to expound and apply the law which he found already established. With *Lord Alvanley*, he considered that whatever the private opinions of the judge may be, it is safer to conform to the established decisions" And in the language of *Lord Hardwicke*, that "to gratify private opinion, established opinions are not to be receded from." He thought it was wiser "to adhere to prior determinations, although we cannot always understand the reasons on which they are grounded," and could not, in the pursuit of a refined equity, disturb the many titles which had been acquired upon the faith of an established rule.

But, again, it is to be remarked, that in *Halsey vs. Whitney*, the deed did not merely prefer one class of creditors to another. The recusant creditors were entirely excluded for the benefit of the debtor himself. The entire argument of the learned judge is addressed against *such* assignments. We shall quote a single sentence which follows his review of the *New York* cases: "Tried by this principle, the stipulation in the present case would make the assignment utterly void; for the surplus, after payment of the assenting creditors, is to go to the debtor." We agree that the principle of "such assignments" is very questionable. They transcend the limits within which the right of preference is to be confined. They would reserve a part of his effects to the debtor himself, and would carry his power beyond mere preference.

In the course of his remarks, the learned judge assumed that the question had been settled in *Massachusetts*. The correctness of his deductions has been doubted; but we are inclined to believe that he is sustained in his view by the cases of *Andrews vs. Ludlow*, 5 *Pick.*, 28, and *Nostrand vs. Atwood*, 19 *Pick.*, 281.

In 2 *Kent's Com.*, 536, the chancellor affirms, that "the weight of general authority, both *English* and *American*, is, that an assignment by a debtor of all his property, for the pay-

ment of his debts, and, at the same time, giving preferences and requiring an absolute release from each creditor who accedes, is not *per se* fraudulent and void. The circumstances of the debtor assigning over to the trustees all his property, without any reservation to himself, and giving the surplus, if any, to those creditors, if any, who do not come in and agree to release, on taking their preferred share, is deemed to disarm the transaction of all illegality and unfairness."

The decisions in *New York*, anterior to the case of *Grover vs. Wakeman*, 11 *Wend.*, 187, are in conformity with the foregoing doctrines. For those cases in which the assignment was avoided, "did not turn upon the naked point of a release, but upon that as incorporated into a peculiar trust." 4 *Mason*, 230. As in *Riggs vs. Murray*, 2 *Johns. C. C.*, 565, where, amongst other exceptionable clauses, there was a power of revocation reserved to the grantors. In *Seaving vs. Brinkerhoff*, 5 *Johns. C. C.*, 329, the conveyance was of a part only of the grantor's property. In *Hyslop vs. Clark*, 14 *Johns.*, 458, on the refusal of any one creditor, the trust was avoided, and the grantors were authorised to declare new trusts. And in *Austin vs. Bell*, 20 *Johns.*, 442, the dividends attributed to the creditors who would not release, were to be paid over to the grantor. It must be admitted, that the case of *Grover vs. Wakeman*, more recently adjudged, establishes a very different rule in *New York*. That case has been truly characterised as "the most stern decision that exists either in *England* or in this country," and stands in most striking contrast with the decision by the same court of errors, in *Murray vs. Riggs*, 15 *Johns.*, 571, where the assignment was adjudged to be valid, although it in the first place reserved to the use of the grantors, until one year after they should be discharged by law from their debts, $2,000 a year; gave preferences, empowered the trustees to settle with the creditors on certain terms, and provided that the creditors who did not subscribe to the conditions within one year, or should knowingly embarrass the object of the trust, should be excluded. Such vacillation detracts from the authority of any judicial tribunal, and would lead us

to anticipate within the next cycle another modification of the doctrine. For the present, the law in *New York*, would appear to be firmly settled against the validity of conditional assignments. But it is to be recollected, that the policy of her laws, regulating the relation of debtor and creditor, is very different from that which prevails in this State; and that the decision in *Grover vs. Wakeman*, rests, in part at least, on the ground that the law of *New York* does not recognise the right of an insolvent debtor to an absolute discharge from his debts, although he may make a cession of all his property for the equal payment of all his debts. See *Tracy's Opinion*, 11 *Wend.*, 223.

In *Pennsylvania* the decisions have uniformly supported the validity of such preferences. In *Lippincott vs. Barker*, 2 *Binney*, 174, the question is elaborately discussed by counsel, and is pointedly met by the court. The assignment in that case excluded the creditors who did not release. The animadversions of *Mr. Justice Breckenridge* are directed chiefly against such assignments, and in his opinion, a deed merely preferring the creditors who release, would be far less exceptionable. *Mr. Chief Justice Tilghman* could see no good reason, why the creditors who had assented to the assignment in the case before him should not have the benefit of it. Without fatiguing the court by references to the intermediate cases, we may refer to 5 *Rawle*, 221, for a succinct and most conclusive vindication of the right of the debtor to create conditional preferences. At first glance, says *Chief Justice Gibson*, it would seem difficult to reconcile those preferences with the requisitions of the *Stat.* 13 *Eliz.* But the inequality is properly attributable to the general rule, which authorises the debtor in failing circumstances to create any preferences whatever; and it would be more consistent, to declare that the insolvent debtor should be trustee for the equal benefit of his creditors, and to provide, by a system of coercive bankruptcy, for an application of his estate to the payment of all his creditors.

In *Pierpoint vs. Grahame*, 1 *Wash. C. C. Rep.*, the late

Judge Washington had occasion to express his opinion on the subject. He was clear "that an assignment in trust for the benefit of such creditors as should release their debts, is founded on a good and valuable consideration." He approved of the decision in the case of *Lippincott vs. Barker*, already referred to; and likewise of the case of *Butler vs. Rhodes*, 1 *Ep.*, 236, where a creditor was held bound by his assent to a simple agreement for a composition. In his opinion, therefore, the cases in which a composition has been sustained, are authorities in favor of the right of the debtor to exact releases from the creditors he may prefer.

In *Brashear vs. West*, 7 *Peters*, 615, the assignment excluded all creditors who should not, within a limited term, release the grantor. The court was "far from being satisfied, that upon general principles, *such a deed* ought to be sustained." Nothing, however, is intimated in regard to the validity of a deed, which, providing for all creditors, should merely prefer those who released. The tendency of the deed before the court "is to delay creditors. If there be a surplus, this surplus is placed in some degree out of the reach of those who do not release, and thereby entitle themselves under the deed." It did not tend to the delay of creditors thereby provided for. It would not, in the opinion of the court, as understood by us, have tended to the delay of any, if the surplus had been reserved for the creditors who would not release. The court remarks on the circumstances, that the release is to be "induced by the necessity arising from the certainty of being postponed to all those creditors, who shall not accept the terms by giving the release." "Humanity and policy, however, plead strongly in favor of leaving the product of his future labor to the debtor." "This certainly furnishes a very imposing argument against its being deemed fraudulent." And if the inclination of the court would have been against a deed simply giving preferences to the releasing creditors, we are at no loss to conjecture that it would have proceeded on the ground, that the principle of leaving his future labor to the debtor, is not "established by law" in this country. Happily

for the unfortunate in *Maryland*, that principle is a part of our system regulating the relation of debtor and creditor.

It would be tedious and unprofitable to review all the cases which have been adjudged in this country on this subject. We should find in them only repetitions of the views expressed in the cases to which we have already referred. It will be sufficient then to say, that the right of the creditor to prefer conditionally is recognised in *New Hampshire*, 5 *New Hamp.*, 113, *Haven vs. Richardson.* In *Virginia*, 8 *Leigh*, 291, *Skipwith vs. Cunningham.* In *South Carolina*, 1 *Richardson's Eq. Reps.*, 217, *Le Prince vs. Guillemot.* 2 *Hill's Ch'y*, 443, *Nolan vs. Douglas.* And in *Maine*, 5 *Greenlf.*, 245, *Fox vs. Adams.* 6 *Greenlf.*, 395, *Canal Bank vs. Cox.* 2 *Fairf.*, 45, *Todd vs. Bucknam, against the decision in Ware*, 241, *the Brig Watchman.* In Alabama, 2 *Stewart*, 56, *Robinson vs. Rapelye.* 12 *Ala.*, 101, 104. 17 *Verm.*, 311.

In *Connecticut*, the inclination of the courts seems to be against the right, though the facts present cases of deeds providing for the creditors releasing only. 6 *Conn.*, 282, *Ingraham vs. Wheeler;* and also in *North Carolina*, 1 *Iredell*, 490, *Hafner vs. Irwin.* In *Ohio*, the validity of such preferences is denied. 5 *Ohio*, 293, *Atkinson vs. Jordan.* In *Missouri*, which seems to be the only State, besides *New York* and *Ohio*, where the right of the debtor to prefer has been expressly negatived, the authority of the *English* cases is denied on the ground, that the bankrupt laws in that country secure to the debtor the benefit of a final discharge, whilst no such immunity is afforded by the laws of *Missouri.* 6 *Mo.*, 302, *Brown vs. Knox.*

From such contradictory authorities, what rule is to be extracted for the government of the people of *Maryland.* We find no adjudication in our highest court expressly on the point, other than *Albert vs. Winn*, which the court has permitted us to overlook. But we do find that cases have arisen in which the very point was directly presented, and the counsel have failed to discuss it. We know that from the earliest times to which tradition carries us back, down to a very recent period,

the profession have, with common consent, affirmed the validity of those assignments. And in every commercial crisis, as in the years 1799, 1800, again in 1818, 1819, and again in 1834, the common formula of the assignment contained a stipulation for releases. The present chief justice of the Supreme Court informs us, that "it was generally understood whilst he was at the bar, and indeed he had not, in his experience as a member of the bar, heard it doubted, that deeds like the present were valid in this State." We rely then on the common consent of the profession, and the general acquiescence of the community at large, and upon the inconvenience and distress which will be occasioned by opening the question and disturbing the very many titles which have been acquired upon the faith of such opinion and acquiescence, as most persuasive in favor of the validity of such assignments. We rely further on the general tone of the *English* cases, and on the preponderance of authority in this country, which is yet more increased by excluding from the balance the cases in *New York* and *Missouri*, whose policy in relation to debtor and creditor differs so essentially from our own.

The last argument to which we propose to address ourselves, is derived from the circumstance, that in several States where the validity of conditional assignments has been sustained by the judicial decisions, the legislature has interposed and established a different rule. In the view which we have been accustomed to take of this subject, those acts of legislative interference are to be treated as amendatory of the law—as acts which give the law for the future, and which confirm the adjudications as correct expositions of law for the past. Those acts certainly indicate a change of policy as to this subject, on the part of the legislatures by which they have been enacted. Before they can serve as precedents to be incorporated into our legislation, we should be convinced that the policy of the States by which they have been enacted, in relation to debtor and creditor, is identical with our own. If they are entitled to any influence, they serve to show that, independently of any statutory regulation, the weight of authority is too strongly in favor

of those conditional preferences to be removed by any other than legislative power.

Upon the whole, we would respectfully conclude:

1st. That the current of *English* decisions is unbroken in favor of the right of the debtor to prefer his creditors releasing him.

2nd. That the great weight of authority in this country, is in the same direction.

3rd. That the allowance of conditional preferences advances the policy of our whole system of law regulating the relation of debtor and creditor; and affords the only effectual means of accomplishing the objects of that system.

The following is a brief note of the opinion delivered by *Chief Justice Taney*, in the case of *White, Warner & Co., vs. Winn and Ross*, in the *United States Circuit* court, upon the very deed decided in the case of *Albert and wife vs. Winn and Ross*, 7 *Gill*, 446, to be void:

"The material part of this case may be thus stated: *Jones*, on the 26th October, 1846, conveyed all his property and effects to *Winn and Ross*, in trust, to pay: 1st. His creditors who should, on or before a certain day thereafter, deliver to the trustees releases of their claims against *Jones*. 2nd. All other creditors. *Jones* was, at this time, insolvent, within the provisions of the act of 1834, ch. 293, and the trustees were aware of his situation. On the 11th January, 1847, *Jones* applied for the benefit of the insolvent laws, and *Winn and Ross* were appointed his permanent trustees, and have duly qualified as such. On the 15th January, 1847, the plaintiffs recovered judgment, in the circuit court, against *Jones*, on which they issued their attachment, and laid the same in the hands of the defendants. *Jones*, after the making of the conveyance before stated, and before his application for the benefit of the insolvent laws, acquired no property. The question, therefore, is, whether the plaintiffs (who are citizens of the State of *Pennsylvania*,) are entitled to the condemnation of the property of *Jones*, which was such at the date of the conveyance before mentioned?

"The chief justice, in delivering the opinion of the court, first addressed himself to the objection made to the conveyance, on the ground that it prefers creditors who should release their claims against the grantor to others who refuse to make such releases. The court, he said, was not prepared to affirm, that preferences of this character are entirely consistent with the principle of the *Statute of* 13 *Eliz.* But they are sustained by the uniform current of *English* decisions. And although the more recent *American* cases are in conflict with each other, it may be safely assumed, that the weight of judicial authority, in this country, is in favor of the right of the debtor, (in the absence of any bankrupt or insolvent law,) by a conveyance devoting his entire estate to the payment of his debts, to prefer creditors who will consent to release him from their claims, to other creditors who will not accept such terms. Such, he remarked, are the conclusions of the late *Chancellor Kent* and *Justice Story*, whose concurrent testimony on the subject deserves the highest consideration. In commenting on the case of *Grover vs. Wakeman*, in 11 *Wend.*, 187, which is the leading authority on the opposite side of the question, he repeated, with approbation, the remark of *Ch. Kent*, that it "appears to be the most stern decision that exists either in *England* or in this country, on the subject." He agreed with *Mr. Justice Story*, in *Halsey vs. Whitney*, 4 *Mason*, 206, that the question is one of local law—to be determined by local decisions, if they exist—and influenced by local practice and local opinions, if such practice and opinions are so uniform as to furnish evidence of the local law. He did not consider the case of *McCall vs. Hinckly*, under the circumstances, as a controlling authority. But it was generally understood, whilst he was at the bar, and, indeed, he had not, in his experience as a member of the bar, heard it doubted, that deeds like the present were valid in this State.

"In view of that general understanding of the profession so prevalent and so long entertained, and, as is believed, frequently adopted in practice—in the absence of any overruling decision by the courts in Maryland—and in deference to the clear

weight of judicial authority elsewhere, this court could not hesitate in sustaining the deed against the objection.

"But the court was also of opinion, that under the state of facts admitted, the conveyance created undue and improper preferences within the intent and meaning of the act of 1834, ch. 203; and that the property and effects thereby conveyed, had vested in the defendants, (garnishees,) as permanent trustees of Jones. And it is next to be considered, whether the property, thus passing into the hands of the permanent trustees, is liable to the attachment of the plaintiffs?

"It is to be assumed, that the plaintiffs, as citizens of *Pennsylvania*, are not bound by *Jones*' application for the benefit of the insolvent laws. They may deny the validity of the proceeding. But can they, in the same breath, claim a right, or exercise a privilege which that proceeding, only, has brought into existence? They may assert their remedy against property in the hands of the permanent trustees, over which the insolvent had a control at the time of his application, and which, but for his application, might have been subjected to their execution. But it is not the application of *Jones* which is relied on to protect the property in question from the attachment of the plaintiffs. That property did not belong to *Jones* at the time of his application. It had been conveyed to others by a deed good at the date of its execution, which remained good to the time of his application, and which, but for that application, would have remained good to the present hour. And it is to be observed, that the deed is not made absolutely void. As against all others, than the permanent trustees, *it is yet good:* and the operation of the law in their favor, is to transfer the title to them through the grantees, for the benefit of creditors generally. The plaintiffs, then, are reduced to this dilemma: If they deny the validity of the proceedings, on *Jones*' application for the benefit of the insolvent laws, the deed will afford a sufficient protection against them. If they insist that the deed is avoided by the provisions of the insolvent law, they must claim under the permanent trustees such interest, only, as by that law is awarded to them.

"The conclusion is, that they must elect to be non-suited, or to take a dividend of the fund in hand of the trustees."

MAGRUDER, J., delivered the opinion of this court.

We are required, in this case, to assume, that the deed which furnishes the matter of controversy, was a conveyance of all the property of the grantor, for the purposes therein expressed, and the court is asked to say, that all such deeds are fraudulent, if impeached by creditors not parties to them, although nothing like actual fraud was designed.

The deed is a deed of trust, for the benefit, principally, of such creditors as shall release their claims, but securing the surplus to such as do not release. Can creditors, who have been invited, but refused to participate in the trust fund, on the condition thereto annexed, ask that the deed be declared void, to the prejudice of the rights of other creditors who have released their claims, and thereby acquired a title, each one to his proportion of their trust fund?

In the case of *McCall and others, vs. Hinkley, &c.*, 4 *Gill*, 128, I took occasion to express my opinion of such deeds at some length, and to cite some authorities which induced me to think that deeds like this are valid. I have no disposition again to cite them, or to add to them others. It seems to me, that it is scarcely to be believed that in the courts of *England*, either before or since the *American* revolution, it would have been decided, that deeds of this description were forbidden by any common or statute law.

I might, indeed, dispose of this question, and would dispose of it, satisfactorily to myself, in these few words:—A debtor, though in failing circumstances, has a right given to him by the common law, and which, it has been decided, is, in this particular, our law, to prefer one, or a class of creditors, to others, by paying, or securing the payment of, the debt due to him, or each of them; and the creditor has a right to receive, in full satisfaction of his claim, a lesser sum than is due to him. This common law right of the debtor, no *English* statute before our revolution, nor act of Assembly of *Maryland*, (bankrupt and

insolvent laws are not here to be noticed,) has taken from such debtor; and until our General Assembly thinks proper to deprive such debtor of this power, our courts cannot deny it, because of their notions of sound policy, or of sound morality, or because judges elsewhere may claim a right so to act.

I do not now, for the first time, express my fears of the crying evil which, if it be not checked, must result from the practice so prevalent in our courts, of relying on the decisions of courts in the sister States, and of the *English* courts, since the revolution, as *authorities*, whence we are to learn the law of *Maryland*. In these notions and dreads, I am not singular. A distinguished jurist, (the late *Mr. Duponceau*,) writing upon this subject, asks: "Are we to wait for every spring and autumn ship from *England*, for cargoes of the decisions of the courts of *Westminster Hall?* This would be derogatory to our national independence, and some States have already shown their sense of this proceeding, by prohibiting the reading, in our courts, of the modern *English* adjudications. Or, are we to refer to that mass of decisions which daily issue, in the form of reports, from the presses of the different States?" Of these latter he says, "they are often contradictory, and probably will become more so."

It is true, it is sometimes pretended that the books cited are not relied on as *authorities*. An *English* judge first cited *Phillips on Evidence* for what the law was, and then added: "Which I refer to, not as authority, but as proof of the understanding of *Westminster Hall* on the subject." We cannot say this when citing the decisions of the courts of our sister States, for when it is our duty to learn what is the law of the State in which a decision is pronounced, we are positively forbidden to consult for it, the reported decisions of the courts of such States. It is only when the enquiry is, what is the law of *Maryland?* that such *extra territorial* decisions are cited and relied on.

With respect to the question now to be decided, the evils of regarding the courts of other States as oracles of this branch of *Maryland* law, are greater than in the decisions of very many

questions. In some of the States, the decisions, we are told, (1st *Am. Select Cases*, *p.* 79,) seem to be grounded upon the difficulties respecting the powers of the courts to compel the trustees to execute the trust, arising from the want of a chancery jurisdiction. It cannot be proper, then, to collect all the decisions of all the courts of all the States, (except those of *Maryland*, as is often the case,) upon the question to be decided and then pick and choose from among them such law as is most approved of by the court. It was, with great propriety, said, by the chief judge of a sister State, that "if we are to take up the decisions of all the States, founded, as they are, upon local customs, colonial necessities, and legislative novelties, and attempt to make them the rule of adjudication, we shall not only disfigure and break down the ancient temple of justice in which we so much glory, but pile up, in its place, a mass of broken fragments, without symmetry, form or beauty. Each of the States adopted some portion; no two of them the same portion of the law of the mother country."

The learned judge might have added, that much of the law of every State, though never to be found in the statute book, is of home manufacture. "Much of the law of every country depends upon established usage. Legislation can only settle principles, while the application of those principles must either be left, in all cases, to the discretion of the magistrate, or must be modified or governed by judicial decisions."

I have thus spoken of the evils which must be the result of using, as authorities *here*, the decisions of the courts of our sister States; not because a majority (indeed it would seem that very few) of them have pronounced such deeds to be void, but because, that but for one or two such decisions which *here* would be regarded as judicial legislation, it is not at all probable that this would ever have been considered an unsettled question in *Maryland*.

The question before us is often regarded (it was so regarded by *Justice Story*, 4th *Mason*, 206,) as one of those questions to be decided, to be sure, by local decisions, if they exist; but in the absence of any such decisions, to rest, in a great measure,

upon local opinions and local practice, if therefrom evidence can be furnished of such local law. For this reason, in the decision of the case to which I have already alluded, I spoke of the learned judge who pronounced that decision, and the peculiar respect which is due to his opinion, in the decision of such a question. Since that decision, *Chief Justice Taney* has pronounced deeds of this description to be valid. We have, then, the opinion of the three oldest lawyers in our State, (speaking rather as witnesses than as jurists,) whose *localities*, during their unusually long professional lives, enabled them to say with some confidence, that "whilst they were at the bar, it was generally understood, and in their experience as members of the bar, they had never heard it doubted, that deeds like the present were valid in this State."

We have also the further fact made known to us, that in the various periods of great commercial distress, deeds of this description were very common, were approved of, and so far as we can learn, were never contested in this community. This *communis opinio*, then, has been made "the groundwork and substratum of practice;" and the case before us, is one of the cases spoken of by a learned judge, in 3 *Maul. & Sel.*, 316, as evidence of what the law is, and evidence, too, which our courts must regard, or they will deprive our citizens of much that is valuable law. Of this, there is very much, not to be found in our volumes of reports, and not there simply because it was never formerly doubted, but for which we must depend upon "experience and *traditionary* knowledge."

Others, however, may choose to think and reason quite differently, and because our reports furnish us with no express adjudication, may conclude, that the question is to be regarded as *res nova*, and being so, it must, they would tell us, be settled upon *principle*. Perhaps, however, it would be difficult to refer to any legal principle which would authorise a court to deny the validity of such deeds, unless it would choose to make a law, which will take from the citizen the common law right of the debtor, to settle the claim of one creditor, leaving unsatisfied that of others. Even the learned judge, with whose opin-

ion we are furnished in 1*st Select American Cases*, 73, (and which is treated as the leading case upon this subject in this country,) while he evidently is not partial to such deeds, and declares, that it is difficult at a glance to reconcile the mind to a decision in support of these conditional assignments in any case, is constrained to admit, that it is not easy to point out a defect in the argument by which they have been sustained, and declared the deed to be valid.

An attempt was formerly made, to distinguish between preferential trusts and preferential payments, in dealing with those deeds: but this mode of assailing them, seems now to be abandoned.

It is said, that such deeds practise upon the hopes and fears of the creditor, and put the property beyond his reach, except on terms prescribed by the debtor. For such reason, deeds of this description are to be declared void in *Maryland*, "although," in the language of *Chief Justice Gibson*, "the immense amount of property held by the title, would make it dangerous to pause as to the validity of them."

If, to use the language of the objection, the hopes and fears of all the creditors are practised upon with success; if all of them assent to the terms *prescribed* by the debtor, then it is universally conceded, that the deed is valid; that neither creditor nor debtor can object to it. And yet, if only one creditor, (no matter how trifling in amount is his claim,) refuses thus to be practised upon, and will not assent to the terms of the deed of trust, he may object, and by objecting, may deprive all the other creditors, (though to a vast amount,) of the fund to which they have consented to look, and insist upon being permitted to look, for their just and undisputed claims. This right of objecting is confined to the creditors, who are not parties to the deed; and if admissible, upon what ground can a similar attempt be resisted, to vacate a mortgage to any of the creditors, if it was prescribed by the debtor as the condition of the deed, that a considerable credit should be given, after the debts were, by the terms of the original contract, due?

The debtor might have conveyed the same property in trust,

to pay every creditor, by name, every debt but that of the objecting creditor; and to such a deed the latter could make no objection, but because the deed enabled him, if he chose, to make himself a party, he acquires by his refusal to be a party, a right to deprive all others of the benefit of it. Surely this cannot be, because his hopes or fears were practised upon. It is certain, that he is not the person to complain of any wrong done to the other creditors.

It is an objection to such a deed, that the terms are *prescribed* by the debtor; yet oftentimes the creditors, themselves, prescribe the terms. Then, too, would the deed be void?

By such a deed, the debtor, instead of placing his property out of the reach of his creditors, deprives himself of all control over it; puts it out of his own power to waste it; while creditors, who, perhaps, have not as yet instituted suits, are seeking to obtain judgments against him. Even the creditors who have refused their assent to the terms of the deed, have an interest in the trust fund, and in a court of equity can compel an administration of it.

We sometimes, indeed, are told, that men in failing circumstances, are under a moral obligation to distribute their property equally among their creditors. Now granting this to be true, it may furnish a reason for changing the law, which it must be admitted allows them to pay one creditor, and to leave another unpaid: but the courts are not to enforce any such obligation.

But in what school is this morality taught? It must be the system of some Shylock! It cannot receive the deliberate sanction of those, who claim a right to believe, that there is some little difference between a heartless creditor, who, in making his bargain, profits by the necessities of his debtor, and gets every advantage which those necessities enable him to obtain, and the noble-hearted benefactor, who, in aiding his debtor in his difficulties, seeks no gain, and could obtain no reward, save only the luxury of doing good. There are, it is true, objections to this right of a debtor, when in failing circumstances, to prefer one creditor and postpone another; but they are of a very different character, and it is not for courts to say what

weight they shall have with those, to whom alone they can be addressed.

Equality, too, it is sometimes said, is equity. Without stopping to enquire whether this, which is called a maxim of equity, is not sometimes misunderstood, it is sufficient here to say, that if it be a maxim of equity, it is not a maxim of law;—and we are now in a court of law. The rule of law which has the sanction of the community, is: "*Vigilantibus non dormientibus, leges subveniunt.*" A maxim not very favorable to those, who, in such cases, are offered, but refuse to take, the dividend which others agree to accept. When such a case occurs in equity, then the maxim of equity, applicable to it, will be: "*Æquitas sequitur legem.*"

If our courts of law or equity be authorised to set aside such arrangements as these, then let the law from which such authority is derived, be produced. An arrangement such as this, in which nothing is done but the adjustment of *bona fide* claims, to the satisfaction of both creditor and debtor, cannot be *malum in se*. Surely it cannot be questioned, that every man who has a legal capacity to make a contract, has a right to dispose of his own property in satisfaction of debts which he honestly owes; unless the arrangement which is made, be forbidden by some law of the land:—not a law of any court's enactment. This prohibition is not to be found in the common law. For the power which, in this case, the court is required to exercise, it seems to be admitted, that there is no legislation, unless it be found in the *statute* 13*th Elizabeth*, or in our insolvent laws.

The *statute of Elizabeth*, unquestionably does not take from the debtor his common law right, to prefer a particular creditor, or class of creditors, to others: it does not interfere with the legal right of the debtor to pay, or secure the payment, of the last cent which he owes to one creditor, before he makes any payment to another. It does not annul every conveyance which may have the effect to hinder and delay other creditors, or acts done with that intent. Hence the decision of the court in the case of *Holbird and Anderson*, 5 *D. & E.*, 235. And also in 3*rd Maul. and Sel.*, 372. See, also, *Newland on Con-*

tracts, 381, *(1st Am. Ed.)* *2nd Starkie on Evidence*, 494, *(7th Am. Ed.,)* for expositions of this statute.

For acts which hinder and delay creditors: See *1st Select American Cases*, 80. 1 *Smith's Select Cases*, 11, 12. Any *fi. fa.*, which one creditor may issue, or a mortgage, which is given by a debtor, will probably have the effect to hinder and delay other creditors.

I shall not examine the various supplements to our insolvent law, declaring under what circumstances a preference given by an insolvent *applicant*, to particular creditors, shall be void. These laws do not interfere with the common law right of debtors, in general, to give a preference; but are restricted to those insolvents, who besides being insolvents, apply for the benefit of the insolvent law.

The various supplements to the act of 1805, furnish an answer entitled to considerable weight, in favor of the validity of the deeds, such as we are speaking of. The act of 1834, chap. 203, sec. 1st, relates to persons, who, at the time of executing any deed whatever, and with intent to prefer any creditor, shall be hopelessly insolvent—"when such insolvent" shall have no reasonable expectation of being exempted from liability, or execution for his debts, without applying for the benefit of the insolvent laws, and afterwards becomes an applicant. In cases like this, the deeds and preferences are only declared void: "provided the creditors shall appear not to have had notice of the condition of insolvency of said debtor." All these supplements are legislative expositions, of the supposed defects of the then existing law. How absurd is all this legislation, if it be already the law of this land, that no insolvent debtor, whether applicant or not, can make such arrangement with one or more of his creditors? Surely the act of 1834, embraces conditional, as well as absolute assignments.

An objection derived from our insolvent system, is, that in those conditional assignments, the debtor *prescribes* terms more favorable to himself than the insolvent law offers to him, upon surrendering up all his property.

It would be difficult to prove, that the debtor, himself, always

prescribes to the creditor, the terms of the arrangement; and it will scarcely be insisted, that the creditor ought not to be regarded as a free agent, at liberty to reject, as well as to accept of those terms. It would seem to be the regular order of proceeding, first, to execute the conditional instruments, and afterwards, those which are absolute. The terms of the deed may be, and no doubt often are insisted upon, by the creditors. In such cases is the deed valid, and yet otherwise, if in truth the debtor, and not the creditor, proposes them?

But the terms are more favorable to the debtor, than those which our insolvent law offers to him. Be it so. And can this furnish any reason for declaring an arrangement to which both parties consent, to be void? Was it ever understood, that our insolvent system was designed to prevent debtors from arranging with their creditors, except upon less favorable terms than those which the insolvent laws offered to the former? The insolvent law is made for the relief of persons who are unable to pay their debts, and cannot get from their creditors better terms than *it* offers to them. If this notion be correct, then the condition of an unfortunate debtor would be deplorable indeed, if there were no insolvent laws. Then his creditors could not be merciful to him, and however disposed, could not release their claims, upon the surrender of his property. The insolvent law only subjects to the payment of his debts, property which the debtor afterwards acquires by gift, devise, &c.; whereas, if no insolvent law existed, the law of the land would make property acquired in any way by him, so long as he lives, answerable for his debts.

Will it be argued, that with, or without any insolvent law, creditors may not, if they please, offer to their debtors, terms more liberal than it is in the power of the legislature to offer them? Every creditor is at liberty to refuse to be thus merciful to his debtor;—but if he chooses to be so, what right have other creditors to object to it?

In the very conclusive argument which has been submitted by the counsel for the appellee, we are furnished with late *English* decisions, which shew, that these arrangements "are

very common;" and it is considered by the courts, "that it would be very injurious to disturb them;" that "such a deed ought not to be avoidable, by any particular creditor not excluded from the benefit of it;" and this was declared by the *English* judges, although reminded, that the condition annexed to the assignment, might "compel the creditor to accede to a composition, which the bankrupt laws could not force him to do." See *The King vs. Watson, 3rd Price*, 6.

These things were said in a country which has a bankrupt system, which is designed to *force* an insolvent trader to surrender up his property for the benefit of his creditors; and which, in cases of bankruptcy, admits no right in the bankrupt, under any circumstances, to prefer one, and postpone another creditor. If this be the law in a country, which values highly its bankrupt system, *a fortiori*, must it be the law here, where men are permitted, but never compelled by the law, to seek the relief which our insolvent laws offer to them.

I have however thought it best to rely, upon what I insist has been from time immemorial, our own understanding of our own law upon the subject, rather than upon any decision, in regard to the validity of such conditional assignments, expressed elsewhere. Entertaining, myself, no doubt, that such instruments have always been considered valid in *Maryland;* believing that now to decide otherwise, would destroy the title to much property which has been purchased, and the title to which, depends upon the validity of deeds of this description, I cannot feel over-curious to know, what would be the decision of this question, if it were to be decided elsewhere.

In the course of the last half of a century, many periods of great commercial embarrassment have been known in this State, and many deeds like this have been executed. In most arrangements like this, there will be some creditors, who will be dissatisfied with terms of which others approve; and if there had been any distinguished lawyer of former days, who doubted the validity of such assignments, those doubts, and those dissatisfactions, would have given rise to litigation, which could only have been determined by a decision of the court of last resort.

I shall dispose of the subject with a remark, which has been met with:—"Vastly important it is, to the well-being of this community, that in the decisions of our courts, this *ancient and traditionary knowledge of the law*, should not be lost sight of; and that our judges be not at liberty to select at random, from *American* and recent *English* reports, the doctrines that may suit their momentary fancy."

I am for an affirmance of the judgment.

CHAMBERS and SPENCE, J., concurred.

MARTIN and FRICK, J., dissented.

DORSEY, C. J., did not sit in this cause.

JUDGMENT AFFIRMED.

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ADMINISTRATOR—ADMINISTRATION.

1. In analogy to the practice of allowing executors the counsel fees expended in the successful defence of a will, an administrator will be allowed like fees out of the estate, where his right to a controverted administration is successfully established. *Ex-parte, Young Adm'r of Young*, 285.

2. Under our testamentary system, the right to administer cannot be delegated. The policy of the law, in selecting persons nearest in interest, in preference to others more remote, was to bind up the interest of the administrator with that of persons entitled to the estate. *Ib.*

ADVANCEMENT.

1. By the act of 1798, ch. 101, sub. ch. 11, sec. 6, money given to a child without a view to a portion or settlement, shall not be deemed advancement. *Stewart vs. Pattison's Ex'crs*, 46.

2. If money is delivered by a parent to a child, it will be presumed to be an advancement or gift. *Ib.*

3. A child who has received any advancement from his father, in his lifetime, is bound to bring such advance into *hotch-pot* only in case of actual or total intestacy. *Ib.*

ADVANCEMENT.—*Continued.*

4. A father, in behalf of his son, then a minor, made a conditional bargain with defendant for the purchase of certain lands, subject to the assent of his son, when he attained age, and under this contract advanced to defendant large sums of money for the use of his son, and which, at the time the several advances were made, he intended to give his son. On attaining age, the son refused his assent to this contract. HELD: That in contemplation of law, the money so advanced belonged to the son, and that he could recover it back from the defendant in an action for money had and received. *Johnson vs. Evans*, 155.
5. If this purchase was intended as an advancement in land to the son, subject to the provision that, on attaining age, he might affirm the purchase, or annul it, and treat the advances so made as a debt, then, as the money was only to be the debt of the son, by an election, which could not be made under a void contract, it was, in legal contemplation, the money of the father, and the son could not recover it. *Ib.*

ADVERSARY POSSESSION.

See LIMITATIONS, 2, 3, 5.

ADVERTISEMENT.

See SALES, 5.

AGREEMENT.

See CONTRACT.

ANSWER.

See EVIDENCE, 26.

APPEAL.

1. An appeal is given by our statute law in any civil case in which a writ of error will lie. *Swann, et al., vs. Mayor and Common Council of Cumberland*, 150.
2. As a general rule, an appeal will lie in any civil case where the court below proceeds under its usual and general jurisdiction. *Ib.*
3. Where a special jurisdiction is given to the county court, to be exercised in a peculiar mode, and not to be proceeded in according to the course of the common law, or where an appeal is given to it from some inferior tribunal, an appeal does not lie. *Ib.*
4. In this case, the county court brought the proceedings of the mayor and common councilmen before it, by a writ of *certiorari*. HELD: that in so doing, it acted in virtue of its ordinary jurisdiction, and an appeal lies from its judgment upon the writ. *Ib.*

See PRACTICE IN COURT OF APPEALS.

APPLICATION OF PURCHASE MONEY.

See COURT OF CHANCERY, 1 to 10.
CONTRIBUTION, 1, 2.

ARRAIGNMENT.

1. The object to be effected by a removal is to secure a fair and impartial *trial*, and if the accused has been arraigned in the court where the cause originated, he need not be again arraigned in the court to which it is removed, the arraignment constituting no part of the *trial*. *Price vs. The State*, 295.
2. The issue made by the accused putting himself upon the country for trial, does not contemplate any particular twelve individuals as the jury, as is manifest from the fact that the arraignment always takes place before the jury is sworn, and often at a previous term. *Ib.*
3. The appeal to the accused "how will you be tried?" and his answer, "by my country," is a form handed down from the period when the party had the privilege of selecting a trial by jury, or by battle, and to put himself upon the country, was the formal mode of selecting a trial by jury. *Ib.*

ASSIGNMENT.

1. The 3rd section of the act of 1834, ch. 79, providing that no transfer or assignment of any "lands, tenements, hereditaments, goods, or chattels, or credits," shall avail against an attachment, unless recorded before the issuing thereof, comprehends *choses in action*. *Neptune Ins. Co., vs. Montell*, 228.
2. The act of 1847, ch. 107, repealing the said section of the act of 1834, cannot have the effect to give validity to unrecorded assignments made before the passage of such repealing act. *Ib.*
3. The words "subject to the originally reserved ground-rent," used in an assignment of a lease, are words of description, and not of contract: if they were omitted, the assignee would still be bound to pay the rent reserved in the original lease. *Wahl vs. Barroll and Spence*, 288.

See BANKS, 5.

ASSUMPSIT.

1. A father, in behalf of his son, then a minor, made a conditional bargain with defendant for the purchase of certain lands, subject to the assent of the son, when he attained age, and, under this contract, advanced to defendant large sums of money for the use of his son, and which, at the time the several advances were made, he intended to give his son. On attaining age, the son refused his assent to this contract. HELD: That in contemplation of law, the money so advanced belonged to the son, and that he could recover it back from the defendant in an action for money had and received. *Johnson vs. Evans*, 155.
2. It is not necessary, in order to sustain the count for money had and received, to show that money, in fact, has been loaned. In this case, the loan to the defendant of a bond executed by third parties in favor of the plaintiff, was held sufficient to support this count. *Shanks vs. Dent*, 120.

ASSUMPSIT.—*Continued.*

3. A negro slave was manumitted, by deed, on the 1st of January, 1840, but was held in servitude, by his master, until the 12th of May, 1846. HELD: that he could not maintain an action against his master, to recover the value of his services for the time he was so held to service. *Negro Franklin vs. Waters*, 322.

ATTACHMENT.

1. The term "indebted," in the act of 1795, ch. 56, regulating the suing out of attachments, is not to be construed in a technical or strict legal sense. *Wilson vs. Wilson, Garnishee, &c.*, 192.
2. An attachment may issue on any demand arising *ex contractu*, where the contract ascertains the amount of indebtedness, or fixes a standard so certain as to enable the plaintiff, by affidavit, to aver it, or the jury, by their verdict, to ascertain and find it. *Ib.*
3. By the contract in this case, the defendants were to guarantee the inspection of flour they were to deliver, and if it should not pass superfine, were to make such deduction "as is customary between the different qualities of flour in the place where the flour may be inspected." One thousand eight hundred barrels were delivered, and did not pass superfine. HELD: That this difference could be as easily ascertained as the value of goods sold, where no price is fixed, and this contract may be the foundation of proceedings by attachment. *Ib.*
4. The 3rd section of the act of 1834, ch. 79, providing that no transfer or assignment of any "lands, tenements, hereditaments, goods, or chattels, or credits," shall avail against an attachment, unless recorded before the issuing thereof, comprehends *choses in action*. *Neptune Ins. Co., vs. Montell*, 228.

BALTIMORE CITY COURT.

See REMOVAL OF CASES, 10, 14.

BANKS.

1. The stockholders of a bank, whose charter was about to expire, met and resolved to assign its assets to trustees, for the purpose of private banking, and instructed the president and directors to prepare and execute deeds to effect this object, and the *cashier* to endorse and transfer all the notes, &c., of the bank to such trustees. The president and directors accordingly conveyed the assets to the cashier, in trust, to convey them to themselves, as trustees, to be held for the uses expressed in the resolutions of the stockholders, which was done. On the same day, being that preceding the expiration of the charter, the directors of the bank met, and, among other things, directed *J P V*, as president of the bank, to endorse all notes, &c., payable to the bank, which was done in the presence and with the assent of the cashier. They then adjourned *sine die*, and the corporation was dissolved. HELD: That, by these proceedings, the directions of the stockholders were, in substance, com-

BANKS.—*Continued.*

plied with, and the assets properly transferred to the trustees, who were, therefore, entitled to sue upon the notes due the bank, and thus endorsed by the president, and transferred to them. *Merrick vs. Bank of Metropolis*, 59.

2. A declaration set forth a note as payable to "*The Bank of the Metropolis.*" HELD: that this being enough to show that there is such a body politic, and to distinguish it from others, the corporation is well named. *Ib.*
3. The president and directors having, by the charter, full power to conduct the affairs of the bank, had the right to authorise the president to indorse its notes. *Ib.*
4. That the assent of a majority of the stockholders is the assent of all, is an implied stipulation in every compact of this sort. *Ib.*
5. The president and directors of a bank have the right to assign for the payment of debts, without the assent of any single stockholder. *Ib.*

BANK STOCK.

See TRUST, TRUSTEE, 4, 13.

BASTARDS.

See ILLEGITIMATE CHILDREN.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. The fact that two make a note, is a sufficient consideration for the promise of *one* to pay. *Merrick vs. Bank of Metropolis*, 59.
2. Unless *mala fides* be proved or alleged, the court will not inquire into the *consideration* of an endorsement. *Ib.*
3. The authority to endorse, conveys *per se*, the authority to *deliver;* the allegation of indorsement includes delivery, and when the former is proved, it is unnecessary to prove or aver the latter. *Ib.*
4. If the declaration alleges that two jointly made a note, and jointly promised to pay, after verdict against one sued separately, it will be presumed that they jointly and severally promised. Both may have promised separately in the note, and the one separately afterwards. *Ib.*
5. The endorsee of a note may give it in evidence under the money counts. *Ib.*

CASES EXPLAINED AND APPROVED.

1. The case of *Jordan vs. Trumbo*, 6 *G. & J.*, 103, asserts the rule in regard to pleading usury, in all its breadth, but evidently applicable only where relief is sought against payment and compliance with an usurious contract. *Thomas vs. Doub*, 1.
2. The circumstances of this case are clearly distinguishable from those of *Dugan, et al., vs. Gittings, et al.*, 3 *Gill*, 138. *Waters vs. Howard, et al.*, 262.
3. The case of *The State vs. Dorsey, Exc'r of Worthington*, 6 *Gill*, 388, explained and approved. *Spencer vs. Negro Dennis*, 314.

CASES EXPLAINED AND APPROVED.—*Continued.*

4. The case of *Queen vs. Ashton*, 3 *H. & McH.*, 439, explained and approved. *Negro Franklin vs. Waters*, 322.

CERTIORARI.

1. The process of *certiorari*, is the appropriate mode by which superior courts examine into the authority of an inferior tribunal, and ascertain whether it has transcended the special powers to which it is limited by law. *Swann, et al., vs. Mayor and C. C. of Cumberland*, 150.

See APPEAL, 4.

CHALLENGING OF JURORS.

See PRACTICE, 22.

CHOSES IN ACTION.

See ASSIGNMENT, 1.

CHURCHES.

1. The act of 1802, ch. 111, authorising the incorporation of churches, is not to be restricted to individual churches or societies singly; but two different denominations may unite and form one society or congregation within the meaning of the act. *Neale vs. The Vestry of St. Paul's Church*, 16.

COLLATERAL SECURITY.

1. Where a draft was taken and held by the plaintiffs, as collateral security for their claim on which they brought suit, they are under no obligation to surrender or cancel it. They have the unquestionable right to retain it until their debt is discharged. *Dawson and Norwood, vs. Lambert and McKenzie*, 216.

COLLOQUIUM.

See SLANDER, 13.

COMMON RECOVERY.

See ESTATES TAIL, 1, 3, 4, 5.

COMPARISON OF HANDS.

See EVIDENCE, 13.

CONDITION SUBSEQUENT.

See WILL AND TESTAMENT, 10.

CONSIDERATION.

See BILLS OF EXCHANGE, &c., 2.
VACATING DEEDS, 2, 3.

CONSTITUTIONAL LAW.

1. The act of 1845, ch. 358, requiring *Washington* county court to grant an appeal in this case, and to set out and embody in the record, certain exceptions and points of law decided in a previous cause in said court resembling this, is unconstitutional and void, as the exercise of judicial powers by the Legislature. *Miller vs. State, use of Fiery*, 145.

CONSTRUCTION OF ACTS AND STATUTES.

1. The act of 1782, ch. 23, abolished the ancient mode of docking estates tail by common recovery. *Maslin vs. Thomas*, 18.
2. The concluding words of this act, that all persons shall be debarred who might or could be debarred "by any mode of common recovery," cannot have the effect to introduce a new or more convenient *common recovery*, with all the incidents to the ancient mode, but were used *ex abundanti cautela*, as without them, it might have been contended, that a deed of bargain and sale, or other conveyance of an estate tail, would only perform the office of a fine, or a common recovery with a single voucher. *Ib.*
3. The 10th section of the act of 1799, ch. 79, requiring sheriffs, and other officers, in cases of injunctions issued to prevent their selling personal property taken in execution, to return the same to the party from whom it was taken, does not require nor warrant such officer to return money received from the sale of such property so taken, to the person on whose property the levy was made, where such sale has been consummated anterior to the issuing of the injunction. *Dail vs. Traverse*, 41.
4. By the act of 1798, ch. 101, sub ch. 11, sec. 6, money given to a child without a view to a portion or settlement, shall not be deemed advancement. *Stewart vs. Pattison's Exc'rs*, 46.
5. The provisions of the act of Congress, of 1817, against private banking in the *District of Columbia*, expired in 1836, together with the charters of the banks thereby incorporated. *Merrick vs. Bank of Metropolis*, 59.
6. Upon the true construction of the act of 1797, ch. 57, either party may challenge a juror for cause, before he is sworn, whether he has, or has not, exercised his statutory right of striking four names peremptorily from the panel. *Edelen vs. Gough*, 87.
7. With respect to parties, as between whom the right of pleading set offs, or filing accounts in bar, is allowed, the same rule which applies to the statutes of 2 and 8, of *George the 2nd*, is applicable to the 7th section of the act of 1785, ch. 46. *Milburn vs. Guyther*, 92.
8. The act of 1802, ch. 111, authorising the incorporation of churches, is not to be restricted to individual churches or societies singly; but two different denominations may unite and form one society or congregation within the meaning of the act. *Neale vs. The Vestry of St. Paul's Church*, 116.
9. An illegitimate child, whose parents never married, died intestate and without issue. HELD: that neither his mother nor her legitimate children, had any claim to his estate, under the act of 1825, ch. 156. *Miller, et al., vs. Stewart, et al.*, 128.
10. The 7th section of the act of 1820, ch. 191, legitimates only where the parents subsequently marry, and recognise such child. *Ib.*
11. The act of 1825, ch. 156, only enables an illegitimate to inherit from the mother, and from illegitimate brothers and sisters. *Ib.*

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

12. Acts in derogation of the common law, must receive a strict construction. *Ib.*

13. The clerk entered the verdict, that on the 1st issue, the defendant did not take the property, &c.; on the 2nd, that the property was in the defendant; and on the 3rd, that the property was in a stranger. HELD: that this verdict was for the defendant, and the entering it in this form was a clerical misprison, amendable by this court, under the act of 1809, ch. 153. *Smith vs. Morgan*, 133.

14. The act of 1845, ch. 358, requiring *Washington* county court to grant an appeal in this case, and to set out and embody in the record, certain exceptions and points of law decided in a previous cause in said court resembling this, is unconstitutional and void, as the exercise of judicial powers by the Legislature. *Miller vs. State, use of Fiery*, 145.

15. The mayor and common councilmen of the town of *Cumberland*, passed an ordinance, under the act of 1815, ch. 136, to grade, &c., *Washington* street, in said town, upon the petition of the owners of two-thirds of the property lying upon a *part*, only, of said street. HELD: That under this act, said corporation might pass an ordinance to improve a particular part of a street, upon application of the owners of two-thirds of the property situated on that part, but can order the *whole* street to be improved only upon application of two-thirds of the property owners on the whole street. *Swann, et al., vs. Mayor and C. C. of Cumberland*, 150.

16. The term "indebted," in the act of 1795, ch. 56, regulating the suing out of attachments, is not to be construed in a technical or strict legal sense. *Wilson vs. Wilson, Garnishee, &c.*, 192.

17. The 3rd section of the act of 1834, ch. 79, providing that no transfer or assignment of any "lands, tenements, hereditaments, goods, or chattels, or credits," shall avail against an attachment, unless recorded before the issuing thereof, comprehends *choses in action*. *Neptune Ins. Co., vs. Montell*, 228.

18. The act of 1847, ch. 107, repealing the said section of the act of 1834, cannot have the effect to give validity to unrecorded assignments made before the passage of such repealing act. *Ib.*

19. To make a judgment by default in an action of ejectment, a bar to a lease, and conclusive upon the rights of the tenant, under the statute of 4 *Geo. 2, ch. 28*, it must clearly appear that the court rendering the judgment, designed to exercise the power conferred by the statute; the affidavit of the plaintiff, required by that statute, must be filed during the term at which the judgment was rendered. *Alexander vs. Walter's Lessee*, 239.

20. The power to sell, vested in the collector by the act of 1816, ch. 171, is a naked power, specially conferred by statute, under proceedings *ex parte* in character, and the purchaser who claims under such power, must show affirmatively and positively the regularity

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

of the proceedings out of which it grew, and the existence of all the prerequisites upon which its lawful exercise depended. *Ib.*

21. A notice of sale under the 3rd section of the act of 1816, ch. 171, which describes the property as "a lot belonging to *W*, situated on the east side of *South* street, assessed with damages to the sum of $6.72," without designating its dimensions, on the particular part of the street on which it is located, by reference to a plat or otherwise, is too vague and uncertain in its terms, and is a fatal objection to the validity of the sale. *Ib.*

22. After the right of removal has been once exercised by either party, there can be no second removal. By the express terms of the act of 1805, ch. 65, sec. 49, and of 1809, ch. 138, sec. 20, the removal must be made by the court in which the *indictment is found, and none other. Price vs. The State*, 295.

23. The court of oyer and terminer possessed, in respect to criminal jurisdiction within the city of *Baltimore*, all the general powers and authority which the several county courts possessed within their respective territorial jurisdictions, and remained unchanged by the amendment to the constitution of 1804, '5. *Ib.*

24. The privilege of removal was first made an object of constitutional security by the act of 1805, which left to the legislature no longer the power to deprive a party of its exercise, but only the power of extending it, or prescribing the *mode* of its exercise. *Ib.*

25. The same considerations must govern, and the same result is to be attained by a removal, both in regard to the State and the accused. There is no canon of interpretation which can be applied to the one, which will not apply with equal force to the other. *Ib.*

26. Where a criminal case is removed to an adjoining county for trial, under the act of 1804, ch. 55, it is sufficient to send a *transcript of the record* to the court to which the cause is removed. The original papers on file in the court, ordering the removal, need not be transmitted with the record, or as the record of proceedings. *Ib.*

27. The act of 1822, ch. 162, abolishing estates in joint tenancy, does not apply, and was never intended to apply, to devises or grants made to trustees, for the benefit of third persons. *Gray, et al., vs. Lynch and McDonald*, 403.

28. In this State, trustees holding funds directed to be invested in stocks, have always been in the habit of making such investments in *bank stock*, and if such usage had never before existed, its commencement would have been analogically justified by the 4th and 5th sections of the act of 1831, ch. 315, empowering the orphans courts, in their discretion, to order executors, administrators and guardians to invest trust funds in their hands in *bank stock*. *Ib.*

CONTRACTS.

1. A contract that is illegal in itself, or that contemplates the violation of some statute, or is against public morals, cannot invoke the aid of a court of justice. *Merrick vs. Bank of Metropolis*, 59.

CONTRACTS.—*Continued.*

2. Though the evidence may show the contract to be joint and several, yet the court must look to the pleadings alone, and are confined to what they allege. It is only on the case made in the pleadings, that the plaintiff can recover. *Ib.*
3. When the contract is joint and several, the plaintiff must treat it as wholly joint, or wholly separate, and must sue all the parties together, or each by himself. *Ib.*
4. A father, in behalf of his son, then a minor, made a conditional bargain with defendant for the purchase of certain lands, subject to the assent of his son, when he attained age, and under this contract advanced to defendant large sums of money for the use of his son, and which, at the time the several advances were made, he intended to give his son. On attaining age, the son refused his assent to this contract. HELD: That in contemplation of law, the money so advanced belonged to the son, and that he could recover it back from the defendant in an action for money had and received. *Johnson vs. Evans*, 155.
5. It is no objection to such recovery, that the contract for the purchase of lands was by parol, and, therefore, void under the statute of frauds. *Ib.*
6. When the contract is wholly rescinded, either by mutual consent of the parties, or by virtue of a clause contained therein, the common count lies to recover money paid under the agreement. *Ib.*
7. If this purchase was intended as an advancement in land to the son, subject to the provision that, on attaining age, he might affirm the purchase, or annul it, and treat the advances so made as a debt, then, as the money was only to be the debt of the son, by an election, which could not be made under a void contract, it was, in legal contemplation, the money of the father, and the son could not recover it. *Ib.*
8. *B* and *W* made a parol contract with *O*, for the purchase of certain lands, upon certain terms; upon the compliance with which, on the part of the vendees, the vendor was to give a sufficient deed for the property. HELD: that under this contract, the vendees had a right to demand, and were bound to accept nothing short of an unincumbered legal estate, in fee. *Owings vs. Baldwin and Wheeler*, 337.
9. If the contract is general, it amounts to an undertaking for the conveyance of a legal title, and if the vendor has but an equitable title, the contract is not binding upon the vendee at law, nor in equity, if the vendor cannot procure the legal title. *Ib.*

See ATTACHMENT, 3.

CONTRIBUTION.

1. Three persons conveyed their lands to trustees, in trust, to sell and pay the debts of the grantors, according to their legal priorities. At the time of this conveyance, there were judgments to a large amount against the grantors, both jointly and severally: HELD, that

CONTRIBUTION.—*Continued.*

in administering this trust, the proceeds of the lands are not to be regarded as one common fund, to be applied to the judgments against all or any of the grantors, according to priority, without reference to the source whence the fund arose, or whether the judgments were against one, two, or all the grantors, but that the proceeds of the lands of each were to be applied respectively to the judgments against each, according to priority. *Dodge vs. Doub*, 16.

2. A party who purchased the lands conveyed by one of the grantors, and applied his purchase money in discharge of judgments against such grantor, cannot be called upon to contribute, or account with any one, except the purchasers of such grantors' lands, or his unsatisfied judgment creditors, prior, in point of date, to those satisfied by him. *Ib.*

3. Where there are several sureties, and any of them becomes insolvent, those who pay the whole debt, can compel contribution, in equity, from the remaining solvent sureties, towards the entire debt paid. *Young vs. Lyons et al.*, 162.

CORPORATIONS.

1. The answer of a corporation, under its corporate seal, has the same force and effect, as evidence, as the answer of an individual not under oath would have in a like case, and no other or greater. *Md. and N. Y. Coal and Iron Co., vs. Wingert*, 170.

See PRACTICE, 8.

COUNSEL FEES.

See ADMINISTRATOR, ADMINISTRATION, 1.

COUNTY COURTS.

1. The county courts in this State, being the only courts of record with general common law jurisdiction, can rightfully exercise all the powers exercised by the court of King's bench in *England*, so far as those powers are derived from rules and principles of the common law, and are suited to the change in our political institutions, and not modified by our constitutional or statutory enactments. *Price vs. The State*, 295.

COURT OF CHANCERY.

1. Lands were conveyed to trustees, in trust, to sell and pay the debts of the grantors, according to legal priority. The proceeds were misapplied by the trustees, and *D.*, a purchaser, whose land (for which he had paid the trustees its full value,) was levied upon by judgment creditors having liens prior in date to a judgment of *T.*, who had also purchased lands under the same trust, but had retained the purchase money, and applied it, under an agreement with the trustees, to his own junior judgment, filed a bill against said *T.*, and other co-purchasers, praying for an account and contribution, and that *T.* might be required to pay in his purchase money, to be applied to the elder judgments, with a view to exonerate the land

COURT OF CHANCERY.—*Continued.*

of complainant. After the answer of *T.*, the complainant filed an amended bill, charging that *T*'s judgment, to which he had so applied his purchase money, was founded in usury, and, therefore, void. Upon demurrer, on the ground, among others, of multifariousness, it was HELD: The payment of trust money to *T.*, who, under the circumstances, was not entitled to it, whether the money of the complainant, or other purchasers, established such a relation between all of them, that if any one is called upon to pay again, there is such privity between him and all the others, that he can seek in equity to have the money restored, and properly applied. *Thomas vs. Doub*, 1.

2. In equity, the money paid to *T.*, or the price of the land sold to him, becomes the fund of the party who is prejudiced by the misapplication, and his resort is not alone against the trustees, but he may follow the fund. *Ib.*
3. *T.* must be considered as a purchaser, independent of his judgment and agreement, and his purchase money ought to be paid to the trustees, and cannot be retained by him in satisfaction of his own judgments, unless the prior judgments against the grantors are satisfied. *Ib.*
4. No arrangement with the trustees could let in his judgments before their proper order. *Ib.*
5. In adjusting his claim, these judgments of *T.* are not conclusive, but open to inquiry. They could be impeached by subsequent judgment creditors, for fraud, collusion, payment, or usury, with a view to defeat them, and let in subsequent liens. *Ib.*
6. It is the right of every party, in equity, to question the title, or the legality of a claim that precedes his own, and, by a successful impeachment, to render it void, and defeat it. *Ib.*
7. If subsequent judgments have been paid with the complainant's money, he stands subrogated in the place of these subsequent creditors, is interested in knowing the extent and legality of all the preceding judgments, and, therefore, has such privity and interest as will entitle him to implead *T.* in respect of his judgment, and call on him for a discovery in relation thereto. *Ib.*
8. Where a party seeks to relieve himself, on the ground of usury, from the payment of the sum claimed on a contract, he must tender the amount actually due; but where the contract or judgment is already satisfied, and the party seeks to have the excess accounted for, and restored, the reason of the rule ceases. *Ib.*
9. A willingness to allow all that is actually and fairly due, is the equitable requirement, and as the complainant, in his bill, insists that *T*'s judgment "ought to stand only as a security for the sum actually due from the defendant in it." this, under the circumstances of this case, if not an actual tender, is fully equivalent to

COURT OF CHANCERY.—*Continued.*

what the rule requires; it is an offer to do equity before he asks relief. *Ib.*

10. *T.* has no claim to profit by the complainant's neglect. But for the agreement between him and the trustees, the lands and funds applied to his judgment would still be at the disposal of the trustees, for the relief of the complainant. That agreement cannot overreach the trust, or the prior creditors, to the prejudice of their judgments, and the complainant being, in every equitable point of view, (his lands being held liable for those judgments,) one of those creditors, has a just claim, in a court of equity, to the relief prayed. *Ib.*

11. A married woman, without the knowledge, privity or consent of her husband, made a parol agreement with her brother to mortgage to him certain of her leasehold property, being induced to do so by the professions of her brother, that it was an arrangement to secure her a provision, in the event of her becoming a widow. HELD: that to grant an application by the brother, for the specific performance of such an agreement, would violate the principles of both law and equity. *Berry vs. Cox and wife*, 466.

See PRACTICE IN CHANCERY,
JURISDICTION.
TRUSTS, TRUSTEE.

COVENANT.

1. A covenant in a sub-lease of part of a lot of ground, subject to a ground-rent of $75, that the sub-lessee should hold the sub-demised part "free and clear of any other or greater rent than that reserved in the sub-lease," does not run with the land, or bind or charge the residue of the lot with the whole rent of $75, and exempt the sub-leased portion from liability for any part thereof, but with respect to such residue, is a mere personal covenant. *Wahl vs. Barroll and Spence*, 288.

2. Though this covenant does not run with, or bind the residue, yet it does run with and bind the reversionary interest of the sub-lessor in the sub-leased part, and as against the sub-lessor and his assigns of such reversion, the sub-lessee and his assigns would have their remedy if charged with any other or greater rent than that specified in the sub-lease. *Ib.*

3. The sub-lessee having, himself, become the assignee of the reversion of the sub-leased lot, the sub-lease and all its covenants are, by operation of law, merged and extinguished, and he holds in the same manner and upon the same terms as if no sub-lease had been made, and he had acquired title by regular assignments from the original lessee. *Ib.*

4. The appellants entered into an agreement, under seal, reciting that they "had rented of *R S*, and *S H*, trustee of *A M W*, for one year, a mill, for which they were to pay one hundred and fifty dollars to *R S*, and one hundred and fifty dollars to *S H*, trustee as aforesaid, or

COVENANT.—*Continued.*

such other trustee of *A M W*, as may be lawfully appointed, said sums to be paid in quarterly payments, recoverable by distress or otherwise, by said *R S* and *S H*, or person authorised to receive, jointly or separately, as to either of them may be convenient." On the 5th of February, 1839, *S H* brought an action of covenant for the non-payment to him of the $150. The appellants pleaded, that on the 1st of January, 1839, *S H* had resigned his trusteeship of *A M W*, and another trustee had been lawfully appointed in his place. Upon demurrer to this plea, HELD: That the appellants cannot object that *S H* has lost his character as trustee. Whether trustee or not, does not affect his right to sue under the agreement to which he is the *legal* party. The debt accrued to *S H* in his lifetime, and before the appointment of another trustee, and, of course, survived to his administrator. *Lahy and Counselman vs. Holland's Adm'r*, 445.

5. Where a covenant is by deed poll, one not named in it, cannot recover on it. *Ib.*

6. Two tenants in common may make a lease, reserving portions of the rent to each, and may sever in their actions. *Ib.*

7. Where the covenant is to several, for the performance of several duties to each, there the covenant shall be moulded according to the several interests of the parties, and each shall only recover so far as his own interest extends. *Ib.*

8. In this agreement there is no joint legal interest in the covenantees, and each may maintain separate actions for the recovery of his portion of the rent. *Ib.*

9. If the covenantees have several interests, and the covenant be made with the covenantees, *et cum quolibet eorum*, these words make the covenants several, in respect to their several interests. *Ib.*

10. The covenant being several to each of the covenantees, *R S* cannot sue for the whole, as survivor of *S H*, neither can he, as such survivor, recover the whole sum against a party who agrees to become security that the covenantors will perform all that is required of them by said agreement. *Ib.*

CUMBERLAND.

See CONSTRUCTION OF ACTS AND STATUTES, 15.

DECLARATIONS.

See EVIDENCE, 1, 27.

DEED.

See FRAUDULENT CONVEYANCES.

DEED OF BARGAIN AND SALE.

See ESTATES TAIL, 1, 2, 5.

DELIVERY.

See EVIDENCE, 5.
BILLS OF EXCHANGE, &c., 3.
PRACTICE, 10.

DEMURRER.

See PRACTICE IN CHANCERY, 8, 11.

DESCENT.

See ILLEGITIMATE CHILDREN.

DESCRIPTION OF LAND.

1. A tract of land, whose patent name was "*Western Route*," was described in the sheriff's returns to a writ of *fi. fa.* and *vendi exponas*, and also in the sheriff's deed to the purchaser, as "*West Route.*" HELD: that this variance in the spelling of the name, was not a fatal objection to the title of such purchaser. *Huddleson vs. Reynold's Lessee*, 332.
2. A mistake in spelling the name of a tract of land, will not vitiate an instrument of writing, if the word mispelt resembles, in sound or sense, the right name. *Ib.*
3. Where a tract of land is sometimes called by its patent name, and sometimes by another, which it had acquired by reputation, a conveyance by the latter name will pass the title, and any description in the deed of the owner, which is sufficient to pass the title, will be a sufficient description in a sheriff's return and conveyance. *Ib.*

DIMINUTION, WRIT OF

See REMOVAL OF CASES, 8.

DOCKING ENTAILS.

See ESTATES TAIL.

DOWER.

1. A husband died, in 1809, seized of real estate, of which his widow was dowable. In 1841, the widow filed a bill to recover her proportion of rents and profits, against the executor of the party who had received them from 1809 to 1837. No person bound to assign dower was made defendant, and she had never recovered dower at law or in equity, and made no demand for it in this bill. No demand for dower had ever been made by her until 1838, when she sued at law for the same rents and profits claimed in this bill, and in that suit the verdict and judgment were against her. No excuse for this delay was given, except the allegation in the bill, that "she was not apprised of her rights until after the death, in 1837, of the party who had received said rents and profits." She had, also, in 1839, assigned, by deed, all her dower interest to a third party. HELD: that she could not recover. *Kiddall vs. Trimble*, 207.
2. If there were no other objection to it, this would be regarded as a stale demand, a demand too recently set up to be established in equity. *Ib.*

DOWER.—*Continued.*

3. If a widow has recovered dower at law, she may afterwards sue in equity for her proportion of rents and profits. So if a widow dies pending her suit for dower, equity will allow rents and profits to her administrator. *Ib.*
4. But if a widow, herself, consents to take dower without receiving her proportion of rents and profits, she can never afterwards recover them. *Ib.*
5. It would be difficult to decree rents and profits in this case, without questioning the correctness of the decision in *Steiger's Adm'r, vs. Hillen*, 5 *G. & J.*, 121. *Ib.*

EJECTMENT.

1. Where a party includes in his claim and pretensions, the whole or any part of a tract of land, before he can offer evidence of title thereto, the lines of the entire tract must first be located upon the plats. *Mitchell vs. Mitchell*, 98.
2. But if he seeks, by the location of particular boundaries or lines of an adjacent tract, to elucidate or support the locations of the lands he claims, or locations he may have made as auxilliary thereto, he need only locate such particular boundary or lines. *Ib.*
3. Where the beginning and other boundaries of a tract are lost, so that it is insusceptible of location by the ordinary means, a boundary or boundaries thereof may be proved by the location of a junior survey, whose lines call for such lost boundaries as the *termini* thereof. *Ib.*
4. If all the boundaries common to both surveys are lost, save one, which can be identified by its being stated in the junior survey as the beginning of a third tract, whose beginning can be proved, such proof, with the certificate of the junior survey, will establish it not only as the boundary of the third tract, but as that called for in both the senior and junior surveys. *Ib.*
5. A tract A, calls for a boundary at the *terminus* of its first line, which is also called for as the end of the third line of B, whose certificate states said bound to be, also, the beginning of W. If this boundary, or the place where it stood, be otherwise incapable of proof as a boundary of A, or of B, it may be established as the boundary of both, by proving it to be the beginning of W. *Ib.*
6. At the end of the first line of A, and of the third line of B, a boundary is established, from which A's second line, by its patent, runs 136 *perches* to a bounded tree, the actual *situs* of which cannot be proved; but B's patent, which is junior, runs its fourth line with and binding on A's second line, 139 *perches*, to B's third boundary, "at the end of the second line of A." HELD: that the court should have instructed the jury, as a matter of law, that A's second line terminates at the end of 136 perches, as expressed in its patent. *Ib.*
7. A certified copy of a warrant from the land office is admissible in

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EJECTMENT.—*Continued.*

evidence in connection with the certificate, though the name of the register who issued it, be not appended to it. *Ib.*

8. Where a plaintiff located on the plots, for his claim and pretensions, all that part of a certain tract of land "which was in the possession of *F J M*," making no reference as to the time to which such possession related, it is not competent for him to prove, by witnesses, that *F J M* was in possession of said lands *for several years prior to his death*. *Ib.*
9. A witness is incompetent, where it does not appear by the plats and explanations that he had, upon the ground, pointed out to the surveyor the objects located, as to which he is called to testify. *Ib.*
10. A will offered not as evidence of location, but of title, need not be located on the plots. *Ib.*
11. Surveyors, in their explanations, should state what number of degrees they allow for variation; to say that they make the usual allowance for variation is too indefinite. *Ib.*
12. All the lines of a tract to which the plaintiff lays claim, must not only be truly located on the plots, but must be actually surveyed on the ground. *Ib.*
13. Original locations, if not counter-located by the opposite party, are admitted to be correct; but a counter-location of a counter-location, is a solecism of which we have no example. *Ib.*
14. The mere docket entry in an ejectment case of "agreed," not followed by a judgment dismissing the suit, cannot have the effect to extinguish the legal title of the plaintiff in the land for which the ejectment was brought; the deduction to be drawn from it is, that each party retired from the litigation, leaving their rights precisely as they stood before the suit was begun. *Alexander vs. Walter's Lessee*, 230.

See ESTOPPEL.

ELECTION.

1. The intention to raise an election, must be clear and manifest from the will itself. *Jones vs. Jones*, 197.
2. That intention must be collected from the face of the instrument, and without a clear and express manifestation, it cannot be presumed to extend to property which did not otherwise pass under the will. *Ib.*
3. If a will sufficient to pass personalty, gives a legacy to the heir, and devises the realty away from him, he may take the legacy, and claim the estate by descent; but if the legacy be on the express condition annexed, that he shall confirm the devise, he cannot take the legacy and disaffirm the devise. *Ib.*
4. The wills of infants and feme coverts being void as to realty, raise no implication, and the heir may claim both the legacy and the land devised to another, by such a will. *Ib.*

ELECTION.—*Continued.*

5. A will of lands that is not executed and attested according to our statutes, can create no election as to the lands here, *from implication*, because such an instrument is no will here, and, therefore, inoperative. *Ib.*
6. In this case, a will was executed in *Pennsylvania*, before two witnesses only, and, therefore, void as to the lands in *Maryland*. It contained no express condition requiring an election as to the lands here. HELD: that it could not operate to divest a child of his inheritance here, or put him to his election. *Ib.*

EQUAL DIVISION OF THE COURT.

See PRACTICE, 36, 37.

ESTATES TAIL.

1. Where an estate tail is docked by a deed of bargain and sale, under the act of 1782, ch. 23, an outstanding, unsatisfied judgment against the tenant in tail, will not be let in as a lien or incumbrance on the estate thereby created or enlarged, as would have been the case, had the estate tail been barred by a common recovery. *Maslin vs. Thomas*, 18.
2. It was an incident to a common recovery suffered by a tenant in tail, to let in all preceding incumbrances, but there is no such incident to the deed of bargain and sale. Nor is it incident to an estate tail that every mode of defeating it shall have such effect. *Ib.*
3. The act of 1782, ch. 23, abolished the ancient mode of docking estates tail by common recovery. *Ib.*
4. A party who takes a deed from a tenant in tail, which he is authorised, by the act of 1782, to take, is not thereby estopped, as the recoveror in a common recovery would be, from averring that the tenant in tail had only an estate tail. *Ib.*
5. The concluding words of this act, that all persons shall be debarred who might or could be debarred "by any mode of common recovery," cannot have the effect to introduce a new or more convenient *common recovery*, with all the incidents to the ancient mode, but were used *ex abundanti cautela*, as without them, it might have been contended, that a deed of bargain and sale, or other conveyance of an estate tail, would only perform the office of a fine, or a common recovery with a single voucher. *Ib.*

ESTOPPEL.

1. A party who takes a deed from a tenant in tail, which he is authorised, by the act of 1782, to take, is not thereby estopped, as the recoverer in a common recovery would be, from averring that the tenant in tail had only an estate tail. *Maslin vs. Thomas*, 18.
2. The owner of a leasehold interest in a lot of ground, in 1811, devised it by will to the appellees, the children of his daughter *M*, with directions that W., the husband of *M*, should receive the rent there-

ESTOPPEL.—*Continued.*

of. The reversion in fee of the same lot in 1814, became vested in *S R M*, one of the appellants. *W* took possession and paid the ground rent to *S R M*, up to March 1819, when he left the property. About one year after this, *S R M*, rented the lot to one *Smith*, against whom, in 1823, the rent being in arrear, she brought an action of ejectment, in which judgment by default was rendered against the casual ejector, in March of the same year, and in February 1824, the affidavit of the plaintiff required under the statute of 4 *Geo.* 2, was filed in the case. In 1841, the appellees, who had now attained age, brought ejectment against the appellants in possession of the premises. HELD: that the proceedings in the ejectment against *Smith*, do not estop the appellants from denying *W's* possession of the premises at the time that ejectment was brought. *Alexander vs. Walter's Lessee*, 239.

3. *W* not being a party to the suit against *Smith*, and having no privity or connection with the latter, who was the immediate tenant of *S R M*, but claiming the lot under the original lease, there would be no mutuality in making the proceedings in that case, an estoppel to the appellants in this. *Ib.*

4. As the appellants could not rely upon the recovery in the ejectment against *Smith*, as a bar to the right of the appellees to recover in this suit, the rule of reciprocity upon which the doctrine of estoppels stands, forbids the latter from using the same recovery as an estoppel to the former. *Ib.*

5. Estoppels must be reciprocal and bind both parties. They operate only on parties and privies in blood or estate, and can be used neither by nor against strangers. *Ib.*

6. As between the appellant and *Smith*, the former would be estopped from denying the statement in the affidavit of *S R M*, filed in the ejectment case against the latter, but *W*, the father of the appellees, and who was directed to receive the rents of the lot, was a stranger to that suit, and did not act upon, nor was he misled, injured or deceived by the admission in that affidavit, it cannot, therefore, operate as an estoppel *in pais*, to preclude the appellants from showing in this case that they took possession *prior* to the time when the ejectment in that case was brought. *Ib.*

7. Estoppels *in pais*, cannot be pleaded, but are given in evidence to the jury, and under the direction of the court, may operate as effectually as technical estoppels. *Ib.*

8. As a general rule, a party will be precluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter; but as to third persons, he is not bound, but may show that such admissions were mistaken or untrue. *Ib.*

ESTOPPEL.—*Continued.*

9. The doctrine of estoppels *in pais*, stands upon the broad grounds of public policy and good faith: it is interposed to prevent injustice, and to guard against fraud, by denying to a party the right to repudiate his admissions when they have been acted upon by persons to whom they were directed, and whose conduct they were intended to influence. *Ib.*

EVIDENCE.

1. The declarations of a tenant in tail, that he "got the land in controversy by intailment," are admissible for the purpose of proving pedigree, *but not to prove his title to the land as tenant in tail. Maslin vs. Thomas*, 18.
2. Estates tail are created by deed or will, which must be produced, or a proper foundation must be laid for presuming that they existed. Their existence is not to be proved by oral testimony of this description. *Ib.*
3. Where testimony is offered, which has no tendency to prove the issue in the case, it is error to permit it to go to the jury. *Ib.*
4. He who claims to be a creditor, must take care to procure legal evidence of the contract which makes him such, for the law will not help him by any of its presumptions. If a man claims to have lent money to another, something more is necessary than proof of the delivery of the money, for this, *prima facie*, is only proof of payment. *Stewart vs. Pattison's Exc'rs*, 46.
5. A witness who has seen a party write, although but once, and who has in this mode acquired a knowledge of the general character of his handwriting, is competent to testify with respect to its genuineness. *Smith vs. Walton*, 77.
6. A witness who has seen a party write, or who has corresponded with him, is qualified to speak with respect to the genuineness of his signature. *Ib.*
7. The impression made upon the mind of a witness who has seen a person write his name but once, may be exceedingly faint and imperfect, but it is, nevertheless, testimony, provided the witness can declare, that from his knowledge of the character of the handwriting thus acquired, he believes it to be genuine. *Ib.*
8. The question, so far as it relates to the competency of the witness, must depend not on the quantity of his information, but the source from which it is derived. *Ib.*
9. A witness said he believed the signature of the surname to be genuine, but could not say so as to the christian name, and, therefore, could not prove the whole signature. HELD: that this evidence, standing by itself, would be admissible; but its admissibility is placed beyond controversy when offered in connection with the testimony of another witness, who proved, in his opinion, the whole signature genuine. *Ib.*

EVIDENCE.—*Continued.*

10. Where both, by the nature of the questions on cross-examination, and the character of the prayer offered to the court below, by the defendant, it was conceded that the witness had the knowledge capacitating him to testify in regard to the handwriting, his testimony is not open, in this court, to the objection that the plaintiff should have established such knowledge as a preliminary fact, before asking the witness to testify, from such knowledge, to the genuineness of the signature. *Ib.*
11. It is perfectly legitimate, for the purpose of refreshing his recollection of the handwriting, to hand to the witness a paper which he saw the defendant sign, and then for the witness to state, as the result of a comparison between that signature and the impression formed in his mind of the general character of the defendant's writing, derived from antecedent knowledge, that he believed the disputed signature genuine. *Ib.*
12. But the opinion of a witness who founds his belief upon a mere naked comparison of two signatures, one disputed, and the other known by him to be genuine, is clearly inadmissible to prove the genuineness of the disputed signature. *Ib.*
13. It is a rule of law, now too firmly established to be disturbed, that signatures cannot be proved by a direct comparison of hands; by which is meant the collation of two papers in juxta-position for the purpose of ascertaining, by inspection, if they were written by the same person. *Ib.*
14. The sufficiency, in fact, of testimony to sustain the issue, is exclusively a question for the jury. *Ib.*
15. A witness who has seen the defendant write, though but once, is competent to speak with respect to the genuineness of his signature. *Edelen vs. Gough*, 87.
16. In an action upon a single bill, which recited: "On a settlement this day of *H's* two notes due *B*, (amounting to, &c.,) I fall in his debt $406.45, which sum I hereby promise and oblige myself, my heirs, &c., to pay to *B*, or order, for value received," to which *non est factum* was pleaded, the defendant cannot give in evidence that *H* died some twenty years since, and was not related to the defendant in blood or estate, though connected with the opinion of a witness familiar with the handwriting of the defendant, that the signature to the single bill was not genuine. Such evidence is irrelevant to the issue, and would tend to mislead the jury. *Ib.*
17. After parol evidence of the contents, date, &c., of a draft had been given, without objection, by one witness, and a second witness had also testified in regard to the same paper, it is too late to object that such evidence is illegal testimony, because the draft itself, which was in possession of the party in court, but not exhibited in evidence, was the best proof of these facts. *Shanks vs. Dent*, 120.

EVIDENCE.—*Continued.*

18. Evidence which, standing alone and unexplained, would not be competent testimony, may become admissible when followed by other explanatory evidence before objection taken. *Smith vs. Morgan*, 133.
19. In an action of replevin by an executor, a distributee of the testator's estate is an incompetent witness for the plaintiff, on the ground of interest. *Ib.*
20. A release by the distributee, of her interest in the property in dispute in the replevin suit, without releasing her entire interest in the estate, will not restore her competency, because she is still interested in the augmentation of the estate. *Ib.*
21. The plaintiff, to restore the competency of this witness, the daughter of the testator, offered the will of the testator, by which the negro in dispute was given to witness, "for her sole and separate use, exclusive of the control of her husband, during her natural life," and also a release executed by witness and her husband. HELD: that this did not render her a competent witness. *Ib.*
22. Neither the wife alone, nor the husband and wife conjointly, can, at law, divest the wife's interest in property which she holds to her sole and separate use. *Ib.*
23. The acts and declarations of the testator, in regard to the ownership of the negro, for which this action was brought by the executor, are admissible in evidence as part of the *res gesta*. *Ib.*
24. The will of the testator is admissible as a declaration and claim of possession and property to the negro in dispute, by the testator, in his lifetime. *Ib.*
25. Declarations of a party, that he signed a bond with the understanding that another person was to be his co-security, made *after* the act of signing, are not admissible in evidence as part of the *res gesta*. *Miller vs. State, use of Henry Fiery*, 141.
26. The answer of a corporation, under its corporate seal, has the same force and effect, as evidence, as the answer of an individual not under oath would have in a like case, and no other or greater. *Md. and N. Y. Coal and Iron Co., vs. Wingert*, 170.
27. Declarations of a party under whom the defendant claims, by title subsequently acquired, as to a receipt which he was about to execute to defendant, and which constitutes the title paper of the latter, are admissible in evidence against the defendant. *Robinet vs. Wilson*, 179.
28. The deed of the collector of the city of *Baltimore*, conveying to the purchaser, property sold under the act of 1816, ch. 171, is evidence of the *fieri facias* of the sale; the right to convey is implied from the power to sell. *Alexander vs. Walter's Lessee*, 239.
29. But this deed is not evidence of the regularity of the proceedings preceding the sale, and out of which the power to sell arose. *Ib.*

EVIDENCE.—*Continued.*

See EJECTMENT, 7, 10.
RECEIPTS, 1, 2.
SLANDER, for evidence in that action.
PRACTICE, 45.
GUARDIAN AND WARD, 5.

EXECUTOR AND ADMINISTRATOR.

See PRACTICE, 2, 3, 4, 5, 34.
ORPHANS COURT.
MORTGAGE, &c., 1.

EXTINGUISHMENT OF DEBTS.

1. A bond of a mortgagor, for $6,000, secured by mortgage, was paid at its maturity, (1st of April, 1839.) by a check of the obligor for $5,000, and his promissory note for $1,270, payable 1st of April, 1840. Receipts for this check and note were endorsed on the bond, which was delivered up to the obligor. The note not being paid at maturity, it was HELD: That, in the absence of proof of an express agreement to that effect, these receipts, and the delivery up of the bond, did not extinguish the lien of the mortgage. *Md. and N. Y. Coal and Iron Co., vs. Wingert*, 170.
2. The acceptance of a note will not extinguish a debt, unless there be an express contract or agreement to receive it as an absolute payment, and to run the risk of its being paid. *Ib.*

FEME COVERT.

See WILL AND TESTAMENT, 7.

FRAUD.

See STATUTE OF FRAUDS.
FRAUDULENT CONVEYANCES.
LIMITATIONS, 6.

FRAUDULENT CONVEYANCES.

1. In this case, the court, CHAMBERS, SPENCE, and MAGRUDER, J., against the opinion of MARTIN and FRICK, J., who dissented, and contrary to the decision in the case of *Albert and wife, vs. Winn and Ross*, 7 *Gill*, 446, sustained the validity of a deed conveying to a trustee all the grantor's property, in *trust*, to sell the same, and apply the proceeds, 1st. To the expenses of executing the trust and commissions to the trustee. 2nd. To the payment of a certain mortgage on the property. 3rd. To or towards the payment of the claims of all creditors who, within thirty days, should assent to the deed, and execute releases to the grantor of their claims. And 4th. To apply the balance, if any, to the payment of the claims of all other creditors than those therein provided for, rateably and proportionably. *Kettlewell vs. Stewart*, 472.

FREEDOM.

See MANUMISSION.

GUARDIAN AND WARD.

1. Every guardian, however appointed, is under the superintendance and control of a court of chancery, and may be there held responsible for his conduct, upon application of the infant by *prochein ami*. *Barnes and Fergusson, vs. Compton's Adm'rs*, 391.
2. A bill in equity may be filed during infancy, and the court will hear any one on behalf of the infant. *Ib.*
3. A bill filed by the representatives of a ward, against the executors of a guardian, in whose hands the estate of the infant remained unaccounted for at his death, is clearly within the jurisdiction of chancery. *Ib.*
4. The intervention of a remedy at common law, against the representatives of the guardian, cannot be made to control the original relief which chancery had the power to afford. *Ib.*
5. As evidence of payment of a legacy due to a ward, the defendants relied on a memorandum in the handwriting of *C*, the husband of the ward, by which he charged himself with "amount of *B's* draft, 500," (*B* being the guardian.) The draft was not produced, and there was no proof of its payment, or on what account it was drawn. They further claimed a credit of $15,000, being the amount of a check by *B*, on a bank in *Baltimore*, payable to *C, or bearer*, which was paid by the bank, but to whom the money was paid, did not appear. HELD: that this evidence of payment was too indefinite and vague to entitle the guardian to a discharge in equity. *Ib.*
6. When payments of this character, looking to the discharge of a guardian's account, are made, it is essential that the party, at his peril, should obtain and preserve the necessary and legal evidence to that effect. *Ib.*

HANDWRITING.

See EVIDENCE, 5 to 14.

HOTCH-POT.

1. A child who has received any advancement from his father, in his lifetime, is bound to bring such advance into *hotch-pot* only in case of actual or total intestacy. *Stewart vs. Pattison's Exc'rs*, 46.

HUSBAND AND WIFE.

1. The plaintiff, to restore the competency of this witness, the daughter of the testator, offered the will of the testator, by which the negro in dispute was given to witness, "for her sole and separate use, exclusive of the control of her husband, during her natural life," and also a release executed by witness and her husband. HELD: that this did not render her a competent witness. *Smith vs. Morgan*, 133.
2. Neither the wife alone, nor the husband and wife conjointly, can, at law, divest the wife's interest in property which she holds to her sole and separate use. *Ib.*

HUSBAND AND WIFE.—*Continued.*

3. A married woman, without the knowledge, privity or consent of her husband, made a parol agreement with her brother to mortgage to him certain of her leasehold property, being induced to do so by the professions of her brother, that it was an arrangement to secure her a provision, in the event of her becoming a widow. HELD: that to grant an application by the brother, for the specific performance of such an agreement, would violate the principles of both law and equity. *Berry vs. Cox and wife*, 466.

ILLEGITIMATE CHILDREN.

1. An illegitimate child, whose parents never married, died intestate and without issue. HELD: that neither his mother nor her legitimate children, had any claim to his estate, under the act of 1825, ch. 156. *Miller, et al., vs. Stewart, et al.*, 128.
2. By the common law, bastards, having no inheritable blood, are incapable of taking as heir to the putative father, mother, or any one else. *Ib.*
3. The 7th section of the act of 1820, ch. 191, legitimates only where the parents subsequently marry, and recognise such child. *Ib.*
4. The act of 1825, ch. 156, only enables an illegitimate to inherit from the mother, and from illegitimate brothers and sisters. *Ib.*
5. Illegitimates cannot take from the legitimate, neither can the legitimate inherit from them.

INADEQUACY OF PRICE.

See VACATING DEEDS, 1.

INFANTS.

See WILL AND TESTAMENT, 7.
GUARDIAN AND WARD.

INJUNCTION.

See JURISDICTION, 5 to 8.
CONSTRUCTION OF ACTS AND STATUTES, 3.

INNUENDO.

See SLANDER, 12, 14.

INSOLVENCY.

See PRACTICE IN CHANCERY, 4 to 10.

JOINT OWNERS OF VESSELS.

1. If three or more persons, not partners in trade, and not purchasing with partnership means, become the purchasers of a vessel, they are regarded in law as part owners thereof, and not as partners; they hold the vessel as tenants in common. *Milburn vs. Guyther*, 92.
2. But it does not thence follow, that upon the termination of the joint ownership by their authorised act, or during its continuance, they can maintain actions at law against each other, either for the recovery of the vessel, or their respective proportions of the freight;

JOINT OWNERS OF VESSELS.—*Continued.*

or that if one part owner, by the consent and for the benefit of all the owners, sells the vessel and receives the proceeds, each of the other part owners can separately sue at law for his proportion of the proceeds of sale. *Ib.*

3. The ordinary remedy of part owners to obtain an adjustment of the ship's account among themselves, is a suit in equity. All the part owners should join as plaintiffs for the recovery of the freight, because all of them are partners with respect to the concerns of the ship. *Ib.*

4. If part owners give a joint authority to an agent to sell the entire ship, they cannot maintain separate actions against him for their respective shares of the money, though each may do so if they separately authorised the agent to sell their respective shares of the ship. *Ib.*

JOINT TENANTS.

See TRUST, TRUSTEE, 9.

JUDGMENT.

See COURT OF CHANCERY, 1 to 10.

JURISDICTION.

1. The jurisdiction of courts of equity to superintend the administration of assets, and decree distribution among legatees, is now fully established. *Barnes and Fergusson, vs. Compton's Adm'rs*, 391.

2. The intervention of a remedy at common law, against the representatives of the guardian, cannot be made to control the original relief which chancery had the power to afford. *Ib.*

3. Where the authority and jurisdiction of the court of chancery is original and established, it is not ousted by a statutory provision, giving to courts of law power over the same subject. *Ib.*

4. Chancery will entertain a bill which, on its face, discloses a complete remedy at law, where sufficient ground is shown for going into equity. *Ib.*

5. Upon a bill filed by the appellants, alleging that the damages for the opening and extension of certain streets in the city of *Baltimore*, secured to them by the act of 1837, ch. 358, had not been assessed to them by the street commissioners of said city, in their proceedings for the extension of said streets, and that upon appeal to the city court, the jury had, also, in their assessment of damages made no assessment of damages to the complainants, who were, thereby, absolutely denied the rights vested in them by said act, the chancellor granted an injunction restraining the appellee from collecting the assessments made by the jury. The answer of the appellee averred, that the provisions of said act of Assembly were especially brought to the attention of the jury, and fully discussed, and deliberately considered by them, and the chancellor thereupon ordered the injunction to be dissolved, which

JURISDICTION.—*Continued.*

order was affirmed upon appeal. *Richardson, et al., vs. Mayor and C. C. of Baltimore*, 433.

6. Courts of equity will interfere where courts of ordinary jurisdiction are inadequate instruments of justice, to restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to third persons by the doubtful title of others. *Ib.*
7. The chancery court has no right to interfere to arrest the proceedings or the judgment of *Baltimore* city court, on the ground of legal error; it has no supervisory power over courts of law. *Ib.*
8. To justify the interposition of equity, there must be some inequitable advantage taken, which would render it unconscientious in the party obtaining it, to enforce the judgment, and of which the party seeking the aid of equity could not have availed himself at law, or was prevented from doing so by fraud or accident, or the act of the opposite party unmixed with any fraud or negligence on his part. *Ib.*

See COUNTY COURTS.

LAND OFFICE.

See EJECTMENT.

LAPSE OF TIME.

See STALE DEMAND.

LIMITATIONS.

Case of Barnes and Fergusson, *vs.* Compton's Adm'rs, 391.

LEASE, LESSOR, LESSEE.

1. A covenant in a sub-lease of part of a lot of ground, subject to a ground-rent of $75, that the sub-lessee should hold the sub-demised part "free and clear of any other or greater rent than that reserved in the sub-lease," does not run with the land, or bind or charge the residue of the lot with the whole rent of $75, and exempt the sub-leased portion from liability for any part thereof, but with respect to such residue, is a mere personal covenant. *Wahl vs. Barroll and Spence*, 288.
2. Though this covenant does not run with, or bind the residue, yet it does run with and bind the reversionary interest of the sub-lessor in the sub-leased part, and as against the sub-lessor and his assigns of such reversion, the sub-lessee and his assigns would have their remedy if charged with any other or greater rent than that specified in the sub-lease. *Ib.*
3. The sub-lessee having, himself, become the assignee of the reversion of the sub-leased lot, the sub-lease and all its covenants are, by operation of law, merged and extinguished, and he holds in the same manner and upon the same terms as if no sub-lease had been made, and he had acquired title by regular assignments from the original lessee. *Ib.*
4. The words "subject to the originally reserved ground-rent," used in an assignment of a lease, are words of description, and not of

LEASE, LESSOR, LESSEE.—*Continued.*

contract: if they were omitted, the assignee would still be bound to pay the rent reserved in the original lease. *Ib.*

See LIMITATIONS, 3.

LEGACY, LEGATEE, &c.

See MANUMISSION, 1.
WILL AND TESTAMENT, 3, 5.
ELECTION, 3.

LETTERS OF ADMINISTRATION DE BONIS NON.

See ORPHANS COURT, 3, 4.

LIBEL.

See SLANDER AND LIBEL.

LIEN.

1. The finder of lost property, for the restoration of which the owner has offered a fixed or certain reward, has a lien on the property, and may retain possession of it, if, on his offer to restore it, the owner refuses to pay the reward. *Wilson vs. Guyton*, 213.
2. But where the offer of the owner was merely to pay "a liberal reward," it was HELD: that there was no ground for the implication of such a lien. *Ib.*
3. The doctrine of lien is more favored now than formerly, and it is now recognised as a general principle, that wherever a party has, by his labor and skill, improved the value of property placed in his possession, he has a lien upon it until paid. *Ib.*
4. Liens are implied when, from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from circumstances, that it was the understanding that they should exist. *Ib.*
5. The existence of liens has been sustained when they contribute to promote public policy and convenience. *Ib.*

See EXTINGUISHMENT OF DEBTS, 1.

LIMITATIONS.

1. The plea of limitations is no bar, where it is proved that the defendant, within three years of the commencement of the action, acknowledged the existence of the debt, without any refusal to pay, or excuse for not paying it. *Johnson vs. Evans*, 155.
2. The rule in *New York*, that a possession of fourteen years is the period from which a regular re-entry at common law for the non-payment of rent, may be presumed, is entirely arbitrary, and not sustained by authority or analogy, and cannot receive the assent of this court. *Alexander vs. Walter's Lessee*, 239.
3. Where a lease contains a clause of re-entry for non-payment of rent, twenty years uninterrupted, exclusive, notorious and adversary possession of the lessor, and those claiming under him, will, in analogy to the statute of limitations, warrant the presumption of a regular re-entry at common law. *Ib.*

LIMITATIONS.—*Continued.*

4. But a prayer which omits to present the question of adversary possession, as a fact to be found by the jury, will be defective. *Ib.*
5. From analogy to the statute of limitations and the doctrine of presumptions as applied to land, a possession for a less period than twenty years, is not sufficient to warrant the presumption of a regular re-entry at common law for the non-payment of the rent reserved by the lease. *Ib.*
6. In this State, where we have a separate chancery jurisdiction, the question of fraud, as a means of preventing the effect and operation of the statute of limitations, must be referred to chancery, and cannot be relied on, by way of replication to the plea of the statute, in a court of law. *Negro Franklin vs. Waters*, 322.

LIMITED JURISDICTION.

See APPEAL, 3.
PRACTICE, 28.

LOCATIONS.

See EJECTMENT.

MANUMISSION.

1. The bequest of freedom to a slave is a legacy equal to the amount of his appraised value. *Spence vs. Negro Dennis*, 314.
2. The design of the acts authorising manumission of slaves, was not to foster emancipation, and thereby, as far as practicable, to put an end to slavery, but it was to enlarge the powers and privileges of masters, and to give them an authority to dispose of their slaves in a way which, otherwise, they did not possess. *Ib.*
3. There has been no material change in the views of the legislature upon the subject of slavery, since the acts of 1715, ch. 44, and 1752, ch. 1, except as to the power of testamentary manumission. *Ib.*
4. A testator, by his will, devised "that all his negroes be free at the age of thirty-eight years, provided they leave the State within thirty days after they attain said age," "and should they return to reside in the State, my will is, then, that they shall be slaves to my heirs." HELD: That the conditions attached to this bequest of freedom, are conditions subsequent, and, being subsequent, are wholly unauthorised by the act of Assembly, and, therefore, void. *Ib.*
5. Testamentary manumission only exists in this State, by virtue of the 13th section of the act of 1796, ch. 67, and can only be exercised in pursuance of the authority thereby given. *Ib.*
6. Under this act a testator may prescribe the period when manumission shall commence, but he has no power to put an end to a state of freedom, and restore the condition of slavery. *Ib.*
7. Freedom having once vested, by no compact between the master and liberated slave, nor by any condition subsequent, attached to

MANUMISSION.—*Continued.*

the gift of freedom, can a state of slavery be reproduced. Nothing short of legislative power, duly exercised, can produce such a result. *Ib.*

MARRIAGE.

See SPECIFIC EXECUTION OF CONTRACTS, 3, 7, 8.

MAXIMS AND GENERAL RULES OF LAW.

See PRACTICE IN CHANCERY, 21.

MAYOR AND CITY COUNCIL OF BALTIMORE.

See Case of Richardson *vs.* Mayor and C. C. of Baltimore, 433.

MERGER.

1. The sub-lessee having, himself, become the assignee of the reversion of the sub-leased lot, the sub-lease and all its covenants are, by operation of law, merged and extinguished, and he holds in the same manner and upon the same terms as if no sub-lease had been made, and he had acquired title by regular assignments from the original lessee. *Wahl vs. Barroll and Spence*, 288.

MISTAKE.

See DESCRIPTION OF LAND.

MORTGAGE, MORTGAGOR AND MORTGAGEE.

1. A receipt by a mortgagee, acknowledging that he has received the mortgage debt in full, is an equitable release of the mortgage, and the absence of a formal release under seal, could not make it the duty of the executors of the mortgagee to return the mortgaged property as part of the assets of their testator, *Marriott, Exc'r of McKim, vs. Handy and wife*, 31.

See EXTINGUISHMENT OF DEBTS, 1.

MOTION IN ARREST OF JUDGMENT.

See SLANDER, 6.

MULTIFARIOUSNESS.

1. Where the relief sought is common to all the plaintiffs, and constitutes but one subject matter of complaint against the defendant, the objection of multifariousness will not hold. *Young vs. Lyons*, 162.

2. Five sureties in a bond of $50,000, paid the entire debt, each contributing the sum of $10,000, and then filed a joint bill in equity against another co-surety, for contribution. HELD: that the objection of multifariousness to such a bill, could not be sustained. *Ib.*

See PRACTICE IN CHANCERY, 1, 2, 3.

NEGROES AND SLAVES.

3. A negro slave was manumitted, by deed, on the 1st of January, 1840, but was held in servitude, by his master, until the 12th of May, 1846. HELD: that he could not maintain an action against

NEGROES AND SLAVES.—*Continued.*

his master, to recover the value of his services for the time he was so held to service. *Negro Franklin vs. Waters*, 322.

See MANUMISSION.

NOTICE.

See PURCHASERS, 1.
SALES, 4.

OBLIGOR AND OBLIGEE.

See PRACTICE IN CHANCERY, 7.

ORPHANS COURT.

1. In proceedings in the orphans courts, exceptions to testimony deemed to be inadmissible, are not required. *Stewart vs. Pattison's Exc'rs*, 46.
2. The orphans court excluded a child from any share of the residue of the personal estate in the hands of the executor, because they were of opinion that a conveyance of a tract of land to him, by the testator, was an advancement, and greater in value than a share. HELD: That this was error. With the real estate of the deceased, when and how he has disposed of it to his children, the orphans court has no concern. In a different form, and in a different *forum*, controversies in regard to the real estate, must be settled. *Ib.*
3. Letters of administration *de bonis non*, with the will annexed, are inoperative and inadmissible in evidence, unless authenticated by the official seal of the orphans court, by which they were granted. *Tuck, Adm'r of Boone, vs. Boone*, 187.
4. The seal of the court, at the end of the will, authenticating the copy of the will, is not sufficient to authenticate the grant of the annexed letters of administration. *Ib.*

1. In analogy to the practice of allowing executors the counsel fees expended in the successful defence of a will, an administrator will be allowed like fees out of the estate, where his right to a controverted administration is successfully established. *Ex-parte, Young Adm'r of Young*, 285.
2. Under our testamentary system, the right to administer cannot be delegated. The policy of the law, in selecting persons nearest in interest, in preference to others more remote, was to bind up the interest of the administrator with that of persons entitled to the estate. *Ib.*

OYER AND TERMINER, COURT OF.

See CONSTRUCTION OF ACTS AND STATUTES, 23.

PAROL CONTRACT.

See PRACTICE, 31.
HUSBAND AND WIFE, 3.

PAROL PROOF.

See RECEIPTS, 1, 2.

PARTIES TO SUITS.
See PRACTICE IN CHANCERY, 7.

PARTNERSHIP, PARTNERS.
See SET OFF, 6.

PART PERFORMANCE.
See SPECIFIC EXECUTION, 4.
STATUTE OF FRAUDS.

PEDIGREE.
See EVIDENCE, 1.

PLEAS AND PLEADING.

1. Though the evidence may show the contract to be joint and several, yet the court must look to the pleadings alone, and are confined to what they allege. It is only on the case made in the pleadings, that the plaintiff can recover. *Merrick vs. Bank of Metropolis*, 59.
2. When the contract is joint and several, the plaintiff must treat it as wholly joint, or wholly separate, and must sue all the parties together, or each by himself. *Ib.*
3. If one of several joint contractors be sued alone, he can only take advantage of it by plea in abatement. It is not matter in bar, or in arrest of judgment, or of variance in evidence on the trial. *Ib.*
4. But, if the declaration discloses that the promise is joint, it is necessary to aver that the other co-promissor is dead, or to account for his not being joined in the action, or it is bad upon demurrer, or writ of error. *Ib.*
5. The plaintiff is entitled to every intendment of law in support of the verdict. Everything that the defendant could object, will be presumed to have been made at the trial, and overruled. *Ib.*
6. When the promise is laid in the declaration, on motion in arrest, it will be presumed that an express promise, if requisite, has been proved. The plaintiff, in such case, is not required to stand upon his proof, but invokes to his aid the intendment of the law. *Ib.*
7. The existence of a legal liability by the defendant, is a sufficient basis for an express promise to be intended after verdict, and the promise of one, on the antecedent liability of both, is also sufficient. *Ib.*
8. If the declaration alleges that two jointly made a note, and jointly promised to pay, after verdict against one sued separately, it will be presumed that they jointly and severally promised. Both may have promised separately in the note, and the one separately afterwards. *Ib.*
9. In an action of replevin, the defendant pleaded *non cepit*, property in himself, and property in a stranger. The plaintiff, by his replication, joined issue on the first plea, and traversed the second and third by affirming property in himself. Upon which traverses issues were joined. HELD that these pleadings were correct, being in conformity with the forms used and practised under [illegible] an early

PLEAS AND PLEADINGS.—*Continued.*

period in the history of the practice of this State. *Smith vs. Morgan*, 133.

10. In this State, where we have a separate chancery jurisdiction, the question of fraud, as a means of preventing the effect and operation of the statute of limitations, must be referred to chancery, and cannot be relied on by way of replication to the plea of the statute, in a court of law. *Negro Franklin. vs. Waters*, 322.

See PRACTICE.

PRACTICE IN CHANCERY.

PRACTICE IN COURT OF APPEALS.

POWERS.

1. A testator devised to three trustees, *by name*, certain property in trust, to sell and convert it into money, and invest the proceeds in "*some safe and profitable stock*," which they were to hold in trust for the sole and separate use of the testator's two daughters. HELD: that this was a power coupled with an interest or trust, which, upon the death of one, could be executed by the surviving trustees. *Gray, et al., vs. Lynch and McDonald*, 403.
2. A mere naked power to sell, not coupled with an interest, does not survive, but when the power is coupled with an interest, it may be executed by the survivor, and it is the possession of the legal estate, or a right in the subject over which the power is to be exercised, which makes the interest in question. *Ib.*
3. Where a power *per se* is merely naked, yet if, in other parts of the will, there are trusts and duties imposed, which require a sale to effectuate the intent of the testator, the power survives. *Ib.*
4. As co-trustees have an authority coupled with an interest, their office survives. *Ib.*

PRACTICE.

1. Where testimony is offered, which has no tendency to prove the issue in the case, it is error to permit it to go to the jury. *Maslin vs. Thomas*, 18.
2. At the instance of legatees, the orphans court sent to the county court issues for trial; 1st, whether *D*, one of the executors, executed a certain mortgage to the testator in his lifetime; 2nd, whether this mortgage had been released in due form of law; and 3rd, whether the money due by it had been paid to the testator in his lifetime. HELD: that *M*, the co-executor of *D*, should be made a co-defendant with him in the trial of these issues. *Marriott, Ex'cr of McKim, vs. Handy and Wife*, 31.
3. The cause being remanded by a decree of this court, directing *M* to be made such co-defendant, and it appearing that *D*, the debtor executor, had died pending the former appeal, and that *M* had made return of the mortgage debt alleged to be due by his deceased co-executor, it was HELD: that the trial of the above issues was no longer necessary. *Ib.*

PRACTICE.—*Continued.*

4. The decree of this court, remanding the cause on the former appeal, was similar to a *procedendo* in any other case. Upon the return of the cause under it, the orphans court might have changed the issues, or added others, if found necessary. *Ib.*
5. When the court below is in possession of a cause under a *procedendo*, it can entirely change the issues, make a new case, convert an action of slander into an action of trover, or upon a promissory note, notwithstanding the words of the writ directing the court to proceed in the case as if no trial had taken place, or appeal prosecuted. *Ib.*
6. A sheriff sold personal property under an execution, and received the money therefor. An injunction then issued suspending further proceedings under the *fi. fa.*, "until the further order of the court." Afterwards, upon application of the party whose property had been so sold, the county court passed an order directing the sheriff to pay said proceeds over to him. HELD: that there was error in this order, because the injunction had not been made perpetual. *Dail vs. Traverse*, 41.
7. In proceedings in the orphans courts, exceptions to testimony deemed to be inadmissible, are not required. *Stewart vs. Pattison's Exc'rs*, 46.
8. A declaration set forth a note as payable to "*The Bank of the Metropolis.*" HELD: that this being enough to show that there is such a body politic, and to distinguish it from others, the corporation is well named. *Merrick vs. Bank of Metropolis*, 59.
9. The endorsee of a note may give it in evidence under the money counts. *Ib.*
10. The authority to endorse, conveys *per se*, the authority to *deliver;* the allegation of indorsement includes delivery, and when the former is proved, it is unnecessary to prove or aver the latter. *Ib.*
11. Unless *mala fides* be proved or alleged, the court will not inquire into the *consideration* of an endorsement. *Ib.*
12. Though the evidence may show the contract to be joint and several, yet the court must look to the pleadings alone, and are confined to what they allege. It is only on the case made in the pleadings, that the plaintiff can recover. *Ib.*
13. When the contract is joint and several, the plaintiff must treat it as wholly joint or wholly separate, and must sue all the parties together, or each by himself *Ib.*
14. If one of several joint contractors be sued alone, he can only take advantage of it by plea of abatement. It is not matter in bar, or in arrest of judgment, or of variance in evidence on the trial. *Ib.*
15. But, if the declaration discloses that the promise is joint, it is necessary to aver that the other co-promissor is dead, or to account for his not being joined in the action, or it is bad upon demurrer or writ of error. *Ib.*

PRACTICE.—*Continued.*

16. The plaintiff is entitled to every intendment of law in support of the verdict. Everything that the defendant could object, will be presumed to have been made at the trial, and overruled. *Ib.*
17. Cured by verdict, means that the court will, after verdict, presume or intend that the particular thing required to sustain it, was proved at the trial. It may, therefore, be intended, in this case, that the death of the other co-promissor was proved to the jury. *Ib.*
18. The fact that two make a note, is a sufficient consideration for the promise of *one* to pay. *Ib.*
19. When the promise is laid in the declaration, on motion in arrest, it will be presumed that an express promise, if requisite, has been proved. The plaintiff, in such case, is not required to stand upon his proof, but invokes to his aid the intendment of the law. *Ib.*
20. The existence of a legal liability by the defendant, is a sufficient basis for an express promise to be intended after verdict, and the promise of one, on the antecedent liability of both, is also sufficient. *Ib.*
21. If the declaration alleges that two jointly made a note, and jointly promised to pay, after verdict against one sued separately, it will be presumed that they jointly and severally promised. Both may have promised separately in the note, and the one separately afterwards. *Ib.*
22. Upon the true construction of the act of 1797, ch. 57, either party may challenge a juror for cause, before he is sworn, whether he has, or has not, exercised his statutory right of striking four names peremptorily from the panel. *Edelen vs. Gough*, 87.
23. A witness who has seen the defendant write, though but once, is competent to speak with respect to the genuineness of his signature. *Ib.*
24. In an action upon a single bill, which recited: "On a settlement this day of *H's* two notes due *B*, (amounting to, &c.,) I fall in his debt $406.45, which sum I hereby promise and oblige myself, my heirs, &c., to pay to *B*, or order, for value received," to which *non est factum* was pleaded, the defendant cannot give in evidence that *H* died some twenty years since, and was not related to the defendant in blood or estate, though connected with the opinion of a witness familiar with the handwriting of the defendant, that the signature to the single bill was not genuine. Such evidence is irrelevant to the issue, and would tend to mislead the jury. *Ib.*
25. After parol evidence of the contents, date, &c., of a draft had been given, without objection, by one witness, and a second witness had also testified in regard to the same paper, it is too late to object that such evidence is illegal testimony, because the draft itself, which was in possession of the party in court, but not exhibited in evidence, was the best proof of these facts. *Shanks vs. Dent*, 120.
26. It is not necessary, in order to sustain the count for money had and received, to show that money, in fact, has been loaned. In this

PRACTICE.—*Continued.*

case, the loan to the defendant of a bond executed by third parties in favor of the plaintiff, was held sufficient to support this count. *Ib.*

27. In this case, the question whether money lost at play can be recovered by the loser after it has been paid, in an action for money had and received, was argued, but not decided. *Jones vs. Mechanics Bank*, 123.

28. In all cases of special limited jurisdiction, the proceedings must conform strictly to the authority conferred. *Swann, et al., vs. Mayor and C. C. of Cumberland*, 150.

29. A father, in behalf of his son, then a minor, made a conditional bargain with defendant for the purchase of certain lands, subject to the assent of his son, when he attained age, and under this contract advanced to defendant large sums of money for the use of his son, and which, at the time the several advances were made, he intended to give his son. On attaining age, the son refused his assent to this contract. HELD: That in contemplation of law, the money so advanced belonged to the son, and that he could recover it back from the defendant in an action for money had and received. *Johnson vs. Evans*, 155.

30. It is no objection to such recovery, that the contract for the purchase of lands was by parol, and, therefore, void under the statute of frauds. *Ib.*

31. When the contract is wholly rescinded, either by mutual consent of the parties, or by virtue of a clause contained therein, the common count lies to recover money paid under the agreement. *Ib.*

32. If this purchase was intended as an advancement in land to the son, subject to the provision that, on attaining age, he might affirm the purchase, or annul it, and treat the advances so made as a debt, then, as the money was only to be the debt of the son, by an election, which could not be made under a void contract, it was, in legal contemplation, the money of the father, and the son could not recover it. *Ib.*

33. The will and the letters together, constitute the plaintiff's title to sue as administrator *de bonis non*, with the will annexed, and if the grant of the letters is defective, the rejection of the will as inadmissible to sustain the issue joined on the plea of *ne unques administrator* necessarily follows. *Tuck, Adm'r of Boone, vs. Boone*, 187.

34. Where there is no evidence adduced in the cause, upon which the instruction asked for could be based, the court are clearly right in rejecting such instruction. *Dawson and Norwood, vs. Lambert and McKenzie*, 216.

35. In cases of an equal division of the court, the jury are still to give a true verdict, and are precisely in the same situation in which they would have been if no instruction had been applied for on either side. *Neptune Ins. Co., vs. Montell*, 228.

PRACTICE.—*Continued.*

36. The usual practice in cases of an equal division of the court, is for each party to ask for instructions, and to except to the refusal to grant them, occasioned by the equal division. *Ib.*

37. To make a judgment by default in an action of ejectment, a bar to a lease, and conclusive upon the rights of the tenant, under the statute of 4 *Geo.* 2, *ch.* 28, it must clearly appear that the court rendering the judgment, designed to exercise the power conferred by the statute; the affidavit of the plaintiff, required by that statute, must be filed during the term at which the judgment was rendered. *Alexander vs. Walter's Lessee*, 239.

38. A prayer which omits to present the question of adversary possession as a fact to be found by the jury, will be defective. *Ib.*

39. The power to sell, vested in the collector by the act of 1816, ch. 171, is a naked power, specially conferred by statute, under proceedings *ex parte* in character, and the purchaser who claims under such power, must show affirmatively and positively the regularity of the proceedings out of which it grew, and the existence of all the prerequisites upon which its lawful exercise depended. *Ib.*

40. A notice of sale under the 3rd section of the act of 1816, ch. 171, which describes the property as "a lot belonging to *W*, situated on the east side of *South* street, assessed with damages to the sum of $6.72," without designating its dimensions, on the particular part of the street on which it is located, by reference to a plat or otherwise, is too vague and uncertain in its terms, and is a fatal objection to the validity of the sale. *Ib.*

41. The advertisement must describe the property so definitely and precisely as that purchasers may, without difficulty, estimate its value. *Ib.*

42. Where a new trial is granted, or where the jury, unable to agree, are discharged, it then becoming necessary to try the case again, *de novo*, the second trial is as much a trial, within the contemplation of law, as the first was, before the party was put to the bar. *Price vs. The State*, 295.

43. A negro slave was manumitted, by deed, on the 1st of January, 1840, but was held in servitude, by his master, until the 12th of May, 1846. HELD: that he could not maintain an action against his master, to recover the value of his services for the time he was so held to service. *Negro Franklin vs. Waters*, 322.

44. In this State, where we have a separate chancery jurisdiction, the question of fraud, as a means of preventing the effect and operation of the statute of limitations, must be referred to chancery, and cannot be relied on, by way of replication to the plea of the statute, in a court of law. *Ib.*

45. Where a party is not called upon to say for what purpose he designs to offer the testimony objected to, there will be error in the court's

PRACTICE.—*Continued.*

rejection of it, if it was admissible for any purpose. *Winter vs. Donovan*, 370.

46. The appellants entered into an agreement, under seal, reciting that they "had rented of *R S*, and *S H*, trustee of *A M W*, for one year, a mill, for which they were to pay one hundred and fifty dollars to *R S*, and one hundred and fifty dollars to *S H*, trustee as aforesaid, or such other trustee of *A M W*, as may be lawfully appointed, said sums to be paid in quarterly payments, recoverable by distress or otherwise, by said *R S* and *S H*, or person authorised to receive, jointly or separately, as to either of them may be convenient." On the 5th of February, 1839, *S H* brought an action of covenant for the non-payment to him of the $150. The appellants pleaded, that on the 1st of January, 1839, *S H* had resigned his trusteeship of *A M W*, and another trustee had been lawfully appointed in his place. Upon demurrer to this plea, HELD: That the appellants cannot object that *S H* has lost his character as trustee. Whether trustee or not, does not affect his right to sue under the agreement to which he is the *legal* party. The debt accrued to *S H* in his lifetime, and before the appointment of another trustee, and, of course, survived to his administrator. *Lahy and Counselman vs. Holland's Adm'r*, 445.

47. Where a covenant is by deed poll, one not named in it, cannot recover on it. *Ib.*

48. Two tenants in common may make a lease, reserving portions of the rent to each, and may sever in their actions. *Ib.*

49. Where the covenant is to several, for the performance of several duties to each, there the covenant shall be moulded according to the several interests of the parties, and each shall only recover so far as his own interest extends. *Ib.*

50. In this agreement there is no joint legal interest in the covenantees, and each may maintain separate actions for the recovery of his portion of the rent. *Ib.*

51. If the covenantees have several interests, and the covenant be made with the covenantees, *et cum quolibet eorum*, these words make the covenants several, in respect to their several interests. *Ib.*

52. The covenant being several to each of the covenantees, *R S* cannot sue for the whole, as survivor of *S H*, neither can he, as such survivor, recover the whole sum against a party who agrees to become security that the covenantors will perform all that is required of them by said agreement. *Ib.*

See PRACTICE IN CHANCERY.

PRACTICE IN COURT OF APPEALS.

EJECTMENT, for practice in that action.

SLANDER, for practice in that action.

REMOVAL OF CASES.

SET OFF.

PRACTICE.—*Continued.*

JOINT OWNERS OF VESSELS.
EVIDENCE, 10, 11.

PRACTICE IN CHANCERY.

1. Lands were conveyed to trustees, in trust, to sell and pay the debts of the grantors, according to legal priority. The proceeds were misapplied by the trustees, and *D.*, a purchaser, whose land (for which he had paid the trustees its full value,) was levied upon by judgment creditors having liens prior in date to a judgment of *T.*, who had also purchased lands under the same trust, but had retained the purchase money, and applied it, under an agreement with the trustees, to his own junior judgment, filed a bill against said *T.*, and other co-purchasers, praying for an account and contribution, and that *T.* might be required to pay in his purchase money, to be applied to the elder judgments, with a view to exonerate the land of complainant. After the answer of *T.*, the complainant filed an amended bill, charging that *T's* judgment, to which he had so applied his purchase money, was founded in usury, and, therefore, void. Upon demurrer, on the ground, among others, of multifariousness, it was HELD: That the relief prayed in the original bill, being essentially and virtually against the operation given to *T's* judgment, there is no inconsistency in the amended bill, which questions the amount of that judgment—the whole transaction being predicated upon one and the same judgment. *Thomas vs. Doub*, 1.
2. Multifariousness is the blending in one bill matters, in their nature, separate and distinct. But not so, if there be two good causes of complaint growing out of the same transaction, where all the defendants are interested in the same rights, and where the relief against each is of the same general character. *Ib.*
3. In this case, the different causes of complaint are not inconsistent or different in their nature and character. They all grow out of the same transaction, in which, in substance, but one question of right is involved, viz: the right of the complainant to be relieved from the preference and effect given to this alleged usurious judgment, by the agreement and acts of *T.* and the trustees. *Ib.*
4. Where there are several sureties, and any of them become insolvent, those who pay the whole debt can compel contribution in equity from the remaining solvent sureties, towards the entire debt paid. *Young vs. Lyons, et al.*, 162.
5. Where the relief sought is common to all the plaintiffs, and constitutes but one subject matter of complaint against the defendant, the objection of multifariousness will not hold. *Ib.*
6. Five sureties in a bond of $50,000, paid the entire debt, each contributing the sum of $10,000, and then filed a joint bill in equity against another co-surety, for contribution. HELD: that the objection of multifariousness to such a bill could not be sustained. *Ib.*

PRACTICE IN CHANCERY.—*Continued.*

7. All parties, obligors and obligees, are required to be made parties to the suit; but an exception to this rule is, that if either of the obligors, principal or surety, is insolvent, he need not be made a party. *Ib.*

8. The allegation that four co-sureties were insolvent, and unable to pay *at the time the bond become due*, is not a sufficient excuse for not making them parties to a bill filed nearly five years afterwards, and the omission to allege insolvency at the time of filing the bill, is fatal on demurrer. *Ib.*

9. The fact of insolvency, at a particular time, being admitted, does not negative the conclusion, that the parties may have become solvent four years afterwards. *Ib.*

10. The allegation, that a party "was utterly insolvent and unable to pay the bond, or any part thereof to the obligee, or his executor, but, on the contrary, previous to the maturity of the bond, had become *utterly and hopelessly* insolvent, and that he was dead at the time of filing the bill," is a sufficient excuse, upon demurrer, for the omission to make him or his personal representative, a party to the proceedings. *Ib.*

11. A demurrer admits the truth of the facts stated in the bill, but does not admit the conclusions of law drawn from them, although they are alleged in the bill. It is not necessary to state facts by positive averment, if the terms be reasonably certain in their import, they are admitted by the demurrer. *Ib.*

12. The issuing, by consent of parties, a commission to take testimony generally, without limitation as to the nature and purpose thereof, is regarded, in *Maryland*, as an admission that the issues are made up, and the general replication to defendant's answer entered. *Md. and N. Y. Coal and Iron Co., vs. Wingert*, 170.

13. The answer of a corporation, under its corporate seal, has the same force and effect, as evidence, as the answer of an individual not under oath would have in a like case, and no other or greater. *Ib.*

14. The complainant filed a bill, claiming the benefit of a trust or charge in his favor, contained in the will of his father. The defendants, the other devisees, demurred to this bill, on the ground that the clause in the will relied on, was too vague and uncertain in its terms, to create such a trust or charge. The chancellor sustained the demurrer, but this court, on appeal, reversed the decree dismissing the bill, and passed a decree remanding the cause, that the court of chancery might refer it to the auditor, with instruction to state an account of the allowance to be made to complainant, under certain directions expressed in the decree of this court. This decree was silent as to the right of the defendants to answer. HELD: that the defendants were not precluded by the decree from answering the

PRACTICE IN CHANCERY.—*Continued.*

original bill, and taking full defence upon the merits. *Tolson vs. Tolson*, 376.

15. The reference, in the decree, to the "condition and habits of life of complainant and his father," was intended to allude to the extent of the estate, and their mode of living, as to expensiveness, economy, &c., and not to denote the complainant's condition relative to his wife and children; it was, therefore, error to average estimates of the sum necessary to support complainant, as the head of a family, with estimates of what was necessary for his individual support. *Ib.*

16. This court, by saying that the entire real estate was chargeable with complainant's claim, did not design to confine the chancellor to any particular mode of securing the complainant the benefit of this lien. There is manifest advantage of adjusting the rights of all parties, and arranging the accounts accordingly. *Ib.*

17. The widow of one of the defendants can only be chargeable in respect to her dower, and her child only as heir to the father. *Ib.*

18. A portion of the estate which descended to the complainant, like every other part of the real estate, is to be charged with its proportionate share of the allowance to be made to him; the proper mode of making this charge, is by crediting this share against his claim. *Ib.*

19. Interest is properly chargeable at the expiration of a year, if any balance of the allowance then remains due. *Ib.*

20. The *English* chancery rule, in regard to the securities in which trust funds must be invested, has never been literally nor analogically extended to *Maryland*. *Gray, et al., vs. Lynch and McDonald*, 403.

21. Where the trustee, without application to the court, does an act which, upon application, would have been ordered, and was, at the time it was done, obviously for the benefit of all concerned, his act will be ratified and affirmed, and held of the same validity as if previously ordered by the chancellor. *Ib.*

See COURT OF CHANCERY.
USURY, 2, 3.
CONTRIBUTION, 1, 2.
JOINT OWNERS OF VESSELS, 3.
JURISDICTION, 5 to 8.
TRUSTS, TRUSTEE.

PRACTICE IN THE COURT OF APPEALS.

1. This court passed a decree reversing an order of the court below, and remanding the cause, but delivered no opinion. HELD: that what was decided by this court in that case will appear from the decree, and not by a reference to the points made and argued by the counsel of either of the parties. *Marriott, Exc'r of McKim, vs. Handy and wife*, 31.

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

2. Where both, by the nature of the questions on cross-examination, and the character of the prayer offered to the court below, by the defendant, it was conceded that the witness had the knowledge capacitating him to testify in regard to the handwriting, his testimony is not open, in this court, to the objection that the plaintiff should have established such knowledge as a preliminary fact, before asking the witness to testify, from such knowledge, to the genuineness of the signature. *Smith vs. Walton*, 77.
3. The clerk entered the verdict, that on the 1st issue, the defendant did not take the property, &c.; on the 2nd, that the property was in the defendant; and on the 3rd, that the property was in a stranger. HELD: that this verdict was for the defendant, and the entering it in this form was a clerical misprison, amendable by this court, under the act of 1809, ch. 153. *Smith vs. Morgan*, 133.
4. Where an instruction excepted to, would not enable the plaintiff to recover more than the verdict would otherwise give him, this court will not reverse the judgment, on account of its being granted. *Johnson vs. Evans*, 156.
5. This court, by the act of 1825, ch. 117, is confined to the points adjudicated by the court below, and questions relating to irregularity of proceedings in the county court, not raised there, cannot be examined here. *Tuck, Adm'r of Boone, vs. Boone*, 187.
6. An instruction that there "are circumstances of suspicion relative to the fairness of certain papers offered by the defendant, which, if said papers were fairly executed, the defendant might explain; and, from the want of such explanatory evidence, the jury may find said papers were not fairly executed," was held erroneous, because it instructed the jury that they must believe the testimony relative to the circumstances of suspicion, and leaves them in ignorance of what those circumstances are. *Neptune Ins. Co., vs. Montell*, 228.
7. A party cannot complain of the granting of an instruction by which he is not injured, even though it may be erroneous. *Ib.*
8. A party who objects to the admissibility of testimony in the court below, is not, upon appeal, confined to the objection there relied on. *Winter vs. Donovan*, 370.
9. Unless a party can show that he has been injured by the judgment of the court below, he cannot ask for its reversal by this court. *Ib.*
10. The complainant filed a bill claiming the benefit of a trust or charge in his favor, contained in the will of his father. The defendants, the other devisees, demurred to this bill, on the ground that the clause in the will relied on, was too vague and uncertain in its terms to create such a trust or charge. The chancellor sustained the demurrer, but this court, on appeal, reversed the decree dismissing the bill, and passed a decree remanding the cause, that the court of chancery might refer it to the auditor, with instruction to state an account of the allowance to be made to complainant, under certain

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

directions expressed in the decree of this court. This decree was silent as to the right of the defendants to answer. HELD: that the defendants were not precluded, by this decree, from answering the original bill, and taking full defence upon the merits. *Tolson vs. Tolson*, 376.

11. It was not competent to this court to allow the defendants to withdraw their demurrer and answer over, though provision for doing so in the court below, might have been made in their decree. *Ib.*

12. Upon a second appeal in the same case, this court may look into and decide questions involved in the record previously brought up, not decided upon the former appeal. *Ib.*

13. The reference in the decree, to the "condition and habits of life of complainant and his father," was intended to allude to the extent of the estate, and their mode of living, as to expensiveness, economy, &c., and not to denote the complainant's condition relative to his wife and children; it was, therefore, error to average estimates of the sum necessary to support complainant, as the head of a family, with estimates of what was necessary for his individual support. *Ib.*

14. This court, by saying that the entire real estate was chargeable with complainant's claim, did not design to confine the chancellor to any particular mode of securing the complainant the benefit of this lien. There is manifest advantage of adjusting the rights of all parties, and arranging the accounts accordingly. *Ib.*

PRESUMPTIONS OF LAW AND OF FACTS.

See EVIDENCE, 4.
WILL AND TESTAMENT, 1, 2, 3.
ADVANCEMENT, 1.
LIMITATIONS, 2, 5.
BILLS OF EXCHANGE, &C., 4.

PROCEDENDO.

See PRACTICE, 4, 5.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, &C.

PURCHASERS.

1. Where a party purchases lands with knowledge, actual or implied, of an outstanding incumbrance, he must stand in the same situation in which his vendor stood before alienation. *Md. and N. Y. Coal and Iron Co., vs. Wingert*, 170.

See COURT OF CHANCERY, 3.

RECEIPTS.

1. It is the unquestioned doctrine of this court, that receipts are not regarded as written, conclusive evidence, but may be explained or contradicted by oral testimony. *Robinett vs. Wilson*, 179.

RECEIPTS.—*Continued.*

2. In this case, a receipt given by a son to his mother, for his distributive share of his father's personal estate, upon which the mother administered, and which was filed in the orphans court, with the administration account, was set aside upon parol proof that it was given without consideration, and was not intended as a *bona fide* transfer of all the son's interest in said estate. *Ib.*

See MORTGAGE, &c., 1.

RECORDING OF ASSIGNMENTS.

See ASSIGNMENTS, 1, 2.

RE-ENTRY.

See LIMITATIONS, 2, 3, 5.

RELEASE.

See MORTGAGE, &c., 1.
EVIDENCE, 20, 21,

REMOVAL OF CASES.

1. Where a criminal case is removed to an adjoining county for trial, under the act of 1804, ch. 55, it is sufficient to send a *transcript of the record* to the court to which the cause is removed. The original papers on file in the court, ordering the removal, need not be transmitted with the record, or as the record of proceedings. *Price vs. The State*, 295.
2. The proceedings in relation to the petit jury, being gone over in the court to which the cause is removed, any irregularity in such proceedings in the court ordering the removal, would not be fatal, and no mention need be made of them in the transcript sent to the former court, except for the purpose of showing at what precise stage of the cause the removal was ordered. *Ib.*
3. The object to be effected by a removal, is to secure a fair and impartial *trial*, and if the accused has been arraigned in the court where the cause originated, he need not be again arraigned in the court to which it is removed, the arraignment constituting no part of the *trial*. *Ib.*
4. At common law, as a general rule, a jury must be returned from the county where the offence is committed, but our statute intercepts this rule in case of removals, and directs the issue to be tried by a jury from another county. *Ib.*
5. There are cases under the *English* statutes, in which, for the trial of offenders, a jury may be taken from a different county, but there is no difference in such cases in the mode of arraignment. *Ib.*
6. In removals from the King's bench, the *venire* in the indictment remains the same; the place of trial alone is changed. *Ib.*
7. In the removal of civil causes, it is not necessary to re-frame the issues in the county where they are removed. *Ib.*
8. The court to which a cause is removed, has no power to order a writ of diminution to correct the transcript of the record sent to

REMOVAL OF CASES.—*Continued.*

it. Where diminution is suggested, the process should be applied for. *Ib.*

9. After the right of removal has been once exercised by either party, there can be no second removal. By the express terms of the act of 1805, ch. 65, sec. 49, and of 1809, ch. 138, sec. 20, the removal must be made by the court in which the *indictment is found, and none other.* *Ib.*
10. The city court of *Baltimore* is vested with all the powers, jurisdiction and authority formerly held and exercised by the court of oyer and terminer for *Baltimore* county, and has authority to remove a cause to an adjoining county for trial. *Ib.*
11. The power of removal, both of criminal and civil cases, is an acknowledged part of the ordinary common law jurisdiction of the courts of King's bench. *Ib.*
12. The privilege of removal was first made an object of constitutional security by the act of 1805, which left to the legislature no longer the power to deprive a party of its exercise, but only the power of extending it, or prescribing the *mode* of its exercise. *Ib.*
13. The practice of removing criminal cases from *Baltimore* city court, has been continued since the act of 1805, and has been twice sustained by the Court of Appeals. *Ib.*
14. The same considerations must govern, and the same result is to be attained by a removal, both in regard to the State and the accused. There is no canon of interpretation which can be applied to the one, which will not apply with equal force to the other. *Ib.*
15. The object of the removal being to secure a fair and impartial *trial*, the case must be removed before the trial, or any part of it, is had in the court ordering the removal. *Ib.*
16. The trial can only be said to commence, within the contemplation of the law regulating removals, when the panel of twelve jurors is completed by being duly sworn. *Ib.*

RENTS AND PROFITS.

See DOWER, 2, 3, 4.

REPLEVIN.

See PLEAS AND PLEADING, 9.

RES GESTA.

See EVIDENCE, 23, 25.

RESULTING TRUSTS.

1. Where one person advances the purchase money for land, and a deed is taken in the name of another, a resulting trust is created by operation of law, in favor of the party advancing the purchase money, and parol proof may be used to prove these facts, which, when established, take the case out of the statute of frauds. *Hays* vs. *Hollis*, 357.

RESULTING TRUSTS.—*Continued.*

2. No such resulting trust will arise where a settlement or donation is deliberately designed by a party competent to make it. *Ib.*
3. Payment or advance of the purchase money by *the party claiming the trust*, before or at the time of the purchase, is indispensable to the creation of such a trust. *Ib.*

SALES.

1. The deed of the collector of the city of *Baltimore*, conveying to the purchaser, property sold under the act of 1816, ch. 171, is evidence of the *factum* of the sale; the right to convey is implied from the power to sell. *Alexander vs. Walter's Lessee*, 239.
2. But this deed is not evidence of the regularity of the proceedings preceding the sale, and out of which the power to sell arose. *Ib.*
3. The power to sell, vested in the collector by the act of 1816, ch. 171, is a naked power, specially conferred by statute, under proceedings *ex parte* in character, and the purchaser who claims under such power, must show affirmatively and positively the regularity of the proceedings out of which it grew, and the existence of all the prerequisites upon which its lawful exercise depended. *Ib.*
4. A notice of sale under the 3rd section of the act of 1816, ch. 171, which describes the property as "a lot belonging to *W*, situated on the east side of *South* street, assessed with damages to the sum of $6.72," without designating its dimensions, on the particular part of the street on which it is located, by reference to a plat or otherwise, is too vague and uncertain in its terms, and is a fatal objection to the validity of the sale. *Ib.*
5. The advertisement must describe the property so definitely and precisely as that purchasers may, without difficulty, estimate its value. *Ib.*

SEAL.

1. Letters of administration *de bonis non*, with the will annexed, are inoperative and inadmissible in evidence, unless authenticated by the official seal of the orphans court, by which they were granted. *Tuck, Adm'r of Boone, vs. Boone*, 187.
2. The seal of the court, at the end of the will, authenticating the copy of the will, is not sufficient to authenticate the grant of the annexed letters of administration. *Ib.*

SET OFF.

1. To warrant a defendant in pleading a set off, or filing an account in bar to an action at law, his claim must be of such a nature that he can sue for and recover it by a suit in a court of law. Legal claims only, can form subjects of set off, or be filed as accounts in bar, in such a court. *Milburn vs. Gaither*, 92.
2. Joint debts cannot be set off against separate debts, nor separate debts against joint debts, either at law or in equity. *Ib.*

SET OFF.—*Continued.*

3. With respect to parties, as between whom the right of pleading set offs, or filing accounts in bar, is allowed, the same rule which applies to the statutes of 2 and 8, of *George the 2nd*, is applicable to the 7th section of the act of 1785, ch. 46. *Ib.*
4. In this case the plaintiff sued the defendant for a separate debt between them. HELD: that the defendant could not set off against this action a claim for his share of the proceeds of sale and freight of a ship of which the plaintiff and defendant, with others, were joint owners, and which was sold by the former, with the joint consent of all, and for the benefit of all. *Ib.*
5. A joint debt cannot be set off against a separate one, nor a separate debt against a joint demand. *Wilson and Co., vs. Keedy*, 195.
6. In this case it was HELD: that a debt due by a partnership of which the plaintiff was a member, to the defendant, could not be set off against the separate claim of the plaintiff. *Ib.*

SHERIFF'S SALE.

See CONSTRUCTION OF ACTS AND STATUTES, 3.

SLANDER AND LIBEL.

1. In an action of slander, the plaintiff cannot offer evidence in aggravation of damages, until he has offered some testimony tending to prove the charges in the declaration. *Winter vs. Donovan*, 370.
2. The second count in the nar, charged the defendant with writing a libellous letter to the witness, on the 3rd of July, 1845, charging the plaintiff with obtaining $300 from defendant, on false pretences. Without proof of any of the counts, the plaintiff asked the witness "if, at any time during the summer of 1845, he received from defendant any letter or letters relative to the employment of the plaintiff, by defendant, as his agent, and the advance by the former to the latter of $300, on account of such agency, and the charge against the latter of having obtained the sum by false pretences?" HELD: that this was a leading question, and was properly rejected. *Ib.*
3. An answer in the affirmative would not have proved that the alleged libel corresponded with the allegation in the second count of the nar, and would have been parol proof of the contents of a written paper, without its appearing that any effort was made to get possession of the paper itself. *Ib.*
4. If a defendant, after publication of a libel, takes possession of it, and retains it, he must have notice to produce it, and refuse, before parol evidence can be given of its contents *Ib.*
5. Slight variances between the words charged, and the words contained in the libel, will prove fatal, and the contents of a libel cannot be proved by parol, until some attempt has been made to produce the libel itself. *Ib.*

SLANDER AND LIBEL.—*Continued.*

6. In an action of slander, if the words stated in the declaration are not actionable *per se*, objections to the insufficiency of the declaration may be taken advantage of by motion in arrest of judgment. *Dorsey vs. Whipps*, 457.
7. Where words are *prima facie* actionable, no prefatory inducement is required, but the reverse is the case where the words do not naturally and *per se* convey the meaning the plaintiff would give to them, or if reference to some extrinsic matter is necessary, in order to their explanation. *Ib.*
8. Saying of the plaintiff, "*M A* told me, during the time he was managing for *Mr. O*, he, *A*, missed some of the plough irons from a plough, and, on going to plaintiff's shop, he there found the irons, and that he then asked plaintiff how those irons came into his shop? and plaintiff replied, he knew not, but requested him, *A*, to say nothing about it, as it would be injurious to his character," is not *per se* actionable. *Ib.*
9. Saying of the plaintiff, "I have been informed that some gentleman in the neighborhood of plaintiff had missed some clevises off his ploughs, and went to plaintiff's to have others made, and on arriving there, found his clevises in the possession of plaintiff, that he claimed the clevises, and plaintiff pretended not to know how they came into his shop, but afterwards acknowledged that he had purchased them from one of claimant's negroes, and begged him to say nothing about it, as it would ruin him," is not *per se* actionable. *Ib.*
10. No words are actionable unless they impute a crime to the plaintiff, which would subject him to punishment, and in deciding what words are actionable, the courts have shown no wish to encourage litigation. *Ib.*
11. If words are not actionable in themselves, their meaning cannot be extended by an innuendo so as to make them actionable. *Ib.*
12. If the words may be understood in a sense not criminal, there must be a colloquium in the prefatory part of the declaration, to show they were spoken in a criminal sense. *Ib.*
13. The office of an innuendo is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; it cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain. *Ib.*
14. The plaintiff having proved the words charged, and other words showing malice, the defendant, for the purpose of justifying such other words, offered, without objection, proof of matters impeaching the plaintiff's character; whereupon the latter, with a view *to rebut this evidence impeaching his integrity*, offered to give evidence that he has always been reputed, among all his acquaintances, as a man of integrity. HELD: that it was error to admit this evidence. *Ib.*
15. If the slander be not justified, the law presumes the character of the

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SLANDER AND LIBEL.—*Continued.*

plaintiff to be good, and it has been recently decided, that evidence of character, on the part of the plaintiff, is inadmissible, whether there is a justification or not. *Ib.*

SLAVERY.

See MANUMISSION,

SPECIFIC EXECUTION OF CONTRACTS.

1. A grandfather, in view of the marriage of his grandson, promised and agreed with the parties, and the mother and friends of the lady, to buy a farm, stock and furnish it, and place his grandson upon it, pay his debts, and give him a start in the world. The marriage was celebrated, and shortly thereafter, the grandfather purchased a farm for about $9,000, and put his grandson and wife in possession thereof, in part stocked it, and soon after died, leaving a will, by which he devised one-third of the residue of his estate, amounting to over $150,000, to his grandson, for life, with remainder to his children, in fee, if any living at his death, and if none, then to his two granddaughters, to whom the remaining two-thirds were devised, with similar limitations. The grandson and wife then filed a bill against the other devisees and executor of the grandfather, alleging that the latter *agreed* to purchase and stock a farm *for complainants*, if the proposed marriage between them should be consummated, and to pay all the debts of his grandson, and furnish adequate means for the support of him and his wife, for the first year after their marriage; that after their marriage, the grandfather, *in part execution of this agreement*, purchased the farm above mentioned, &c., but died without executing a deed to complainants, for the land, or performing the other parts of this agreement, which the bill prays may be specifically executed. Pending this suit, the wife died without issue, and it appearing, from the proof, that the grandfather had the title to the farm conveyed to himself, after the marriage, and while the grandson and his wife were in the possession of it, and that it was his intention to give the possession, only, of the farm, and not the title, to the grandson, whom he wished to reclaim from dissipated and extravagant habits, the chancellor dismissed the bill, and this decree was, on appeal, affirmed. *Waters vs. Howard, et al.*, 261.
2. The circumstances of the case are clearly distinguishable from those of *Dugan, et al., vs. Gittings, et al.*, 3 *Gill*, 138. *Ib.*
3. Marriage is a good and valuable consideration to sustain a contract. But the contract must be certain in all its particulars; so clear and definite, and so far satisfactorily proved, as to be capable of specific execution. *Ib.*
4. If it be a parol contract, to take it out of the statute for part performance, the terms must be definite and unequivocal. If uncertain or ambiguous, a specific performance will not be decreed, for

SPECIFIC EXECUTION OF CONTRACTS.—*Continued.*

the court may enforce what the parties never intended, or contemplated. *Ib.*

5. If a contract is sufficiently established or admitted, it still remains with a court of equity, as a matter of sound discretion, whether, under the circumstances, they will decree specific performance. *Ib.*

6. In cases of specific performance, courts of equity may exercise a sound, reasonable discretion, governed by rules and principles, as far as may be, yet granting or withholding relief when those rules and principles will not furnish any exact measure of justice, according to the circumstances of each case, or where the decree, under the circumstances, would be inequitable. *Ib.*

7. If a marriage contract, containing provisions for children, has been established, and in part executed, and the wife dies without issue, and, by such death, the surviving husband has suffered no injury or prejudice by what has been done towards the promised provision for his wife, equity will not interfere to decree specific execution in his favor. *Ib.*

8. Where a grandfather made provision for the marriage of his grandson, which he did not fulfil to the letter, but, by his will, made a larger and much more beneficial one, this latter provision is a substitute for the former, and excludes the idea of a double portion to the grandson. *Ib.*

9. A specific performance of a contract for the sale of lands, will not be decreed on the application of the vendor, unless his ability to make such a title as he has agreed to make, be unquestionable. *Owings vs. Baldwin and Wheeler*, 337.

10. Part of the land sold under the above contract, was conveyed, in 1799, to *O* and *P*, as joint tenants, in fee. In April, 1818, *P* sold his interest therein to *O*, to whom he gave a paper, signed by himself, and attested by two witnesses, stating that he agreed to take $5,000 for his interest in said property, "which is now bound by a judgment held by *O*, and under execution for the same." The witnesses to this paper prove, that it was agreed between *O* and *P*, to credit the $5,000 on the judgment held by *O*, which was then done in *P*'s presence. Possession was shortly afterwards delivered to *O*, who, with those claiming under him, has held uninterrupted and undisputed possession of the property until 1845, the date of the sale to appellees. *P* survived *O*, and died in 1826, never having executed a deed for the property to the latter, who died in 1819. In May, 1818, *O* sold the property to *B*, and executed a bond of conveyance, but no deed, therefor. *B* took and remained in possession until 1830, when the executors of *O*, having recovered judgment against *B*, for the balance of the purchase money due by him, issued executions, under which the property was sold and conveyed by the sheriff to the appellant, who, in 1846, contracted to sell it to the

SPECIFIC EXECUTION OF CONTRACTS.—*Continued.*

appellees. HELD: That this title of the appellant, thus offered, was not sufficient to authorise a court of equity to decree a specific performance of the contract made with the appellees, and compel them to accept the title of the vendor in this condition. *Ib.*

11. The title of the appellant depending, in a great measure, upon the individual knowledge of the attesting witnesses to this paper, one of whom is already dead, and the duration of this proof being precarious, and the appellant having filed a bill against the heirs of *P*, to perfect his title at law, which bill he dismissed, and the records of the court showing no entry of the credit on the judgments against *P*, a court of equity having a due regard to the claims which might arise from the heirs of *P*, upon the death of the remaining attesting witnesses, would not compel the appellees to accept this title. *Ib.*
12. *B* filed a bill claiming the land under his contract of May, 1818, and impeaching the validity of the sale by the sheriff. The answers to this bill swore away all its equity, and were supported by proof. HELD: that the pendency of this suit, under such circumstances, was not a sufficient ground for a court of equity to refuse to compel the appellants to execute their contract. *Ib.*
13. The mere commencement of a suit for the recovery of the whole, or a part of the land sold, after the filing of a bill for the specific execution of the contract of sale, is not, of itself, sufficient to prevent the vendee's being decreed to accept the title, provided it appears, to the satisfaction of the court, that the suit so commenced cannot be successfully prosecuted. *Ib.*
14. The appellant having purchased, at sheriff's sale, the interest of *B*, under his bond of conveyance, which was a mere equitable title, subject to a lien for the balance of the purchase money due by *B*, and this being the only title he professed to have, the appellees were not bound to accept it. *Ib.*
15. A married woman, without the knowledge, privity or consent of her husband, made a parol agreement with her brother to mortgage to him certain of her leasehold property, being induced to do so by the professions of her brother, that it was an arrangement to secure her a provision, in the event of her becoming a widow. HELD: that to grant an application by the brother, for the specific performance of such an agreement, would violate the principles of both law and equity. *Berry vs. Cox and wife*, 466.

STALE DEMAND.

1. A husband died, in 1809, seized of real estate, of which his widow was dowable. In 1841, the widow filed a bill to recover her proportion of rents and profits, against the executor of the party who had received them from 1809 to 1837. No person bound to assign dower was made defendant, and she had never recovered dower at law or in equity, and made no demand for it in this bill. No demand for

SPECIFIC EXECUTION OF CONTRACTS.—*Continued.*

dower had ever been made by her until 1838, when she sued at law for the same rents and profits claimed in this bill, and in that suit the verdict and judgment were against her. No excuse for this delay was given, except the allegation in the bill, that "she was not apprised of her rights until after the death, in 1837, of the party who had received said rents and profits." She had, also, in 1839, assigned, by deed, all her dower interest to a third party. HELD: that she could not recover. *Kiddall vs. Trimble*, 207.

2. If there were no other objection to it, this would be regarded as a stale demand, a demand too recently set up to be established in equity. *Ib.*

STATUTE OF FRAUDS.

1. Where the statute of frauds is relied on in the answer, as a bar to a specific execution of a parol contract, it can only be evaded by full proof of the acts of part performance charged in the bill. *Owings vs. Baldwin and Wheeler*, 337.
2. Where possession of lands was delivered, not under the contract sought to be enforced, but another subsidiary agreement, the original contract still remaining unrescinded, it will not remove the bar of the statute. *Ib.*

See CONTRACT, 5.

STREETS.

See CONSTRUCTION OF ACTS AND STATUTES, 15.

SURETIES.

See CONTRIBUTION, 3.
PRACTICE IN CHANCERY, 6, 8.

TENANT IN TAIL.

See ESTATES TAIL.

TRANSCRIPT OF RECORD.

See REMOVAL OF CASES, 1.

TRIAL.

See REMOVAL OF CASES, 12.

TRUST, TRUSTEE.

1. Three persons conveyed their lands to trustees, in trust, to sell and pay the debts of the grantors, according to their legal priorities At the time of this conveyance, there were judgments to a large amount against the grantors, both jointly and severally: HELD, that in administering this trust, the proceeds of the lands are not to be regarded as one common fund, to be applied to the judgments against all or any of the grantors, according to priority, without reference to the source whence the fund arose, or whether the judgments were against one, two, or all the grantors, but that the pro-

TRUST, TRUSTEE.—*Continued.*

ceeds of the lands of each were to be applied respectively to the judgments against each, according to priority. *Dodge vs. Doub*, 16.

2. A party who purchased the lands conveyed by one of the grantors, and applied his purchase money in discharge of judgments against such grantor, cannot be called upon to contribute, or account with any one, except the purchasers of such grantors' lands, or his unsatisfied judgment creditors, prior, in point of date, to those satisfied by him. *Ib.*
3. The *English* chancery rule, in regard to the securities in which trust funds must be invested, has never been literally nor analogically extended to *Maryland*. *Gray, et al., vs. Lynch and McDonald*, 403.
4. In this State, trustees holding funds directed to be invested in stocks, have always been in the habit of making such investments in *bank stock*, and if such usage had never before existed, its commencement would have been analogically justified by the 4th and 5th sections of the act of 1831, ch. 315, empowering the orphans courts, in their discretion, to order executors, administrators and guardians to invest trust funds in their hands in *bank stock*. *Ib.*
5. A testator devised to three trustees, *by name*, certain property in trust, to sell and convert it into money, and invest the proceeds in "*some safe and profitable stock*," which they were to hold in trust for the sole and separate use of the testator's two daughters. HELD: that this was a power coupled with an interest or trust, which, upon the death of one, could be executed by the surviving trustees. *Ib.*
6. A mere naked power to sell, not coupled with an interest, does not survive, but when the power is coupled with an interest, it may be executed by the survivor, and it is the possession of the legal estate, or a right in the subject over which the power is to be exercised, which makes the interest in question. *Ib.*
7. Where a power *per se* is merely naked, yet if, in other parts of the will, there are trusts and duties imposed, which require a sale to effectuate the intent of the testator, the power survives. *Ib.*
8. As co-trustees have an authority coupled with an interest, their office survives. *Ib.*
9. The act of 1822, ch. 162, abolishing estates in joint tenancy, does not apply, and was never intended to apply, to devises or grants made to trustees, for the benefit of third persons. *Ib.*
10. Where trustees were directed, by the will, to invest money in stock, and hold the same in trust for certain purposes, after an investment was once made, if the money should be returned to them without default on their part, they would have the power, and would be bound to provide for its re-investment. *Ib.*
11. Where the trustee, without application to the court, does an act which, upon application, would have been ordered, and was, at the time it was done, obviously for the benefit of all concerned, his act will be

TRUST, TRUSTEE.—*Continued.*

ratified and affirmed, and held of the same validity as if previously ordered by the chancellor. *Ib.*

12. The direction, to invest in "some safe and profitable stock," does not restrict the discretion of the trustees, and limit them in their selection to stocks already existing; they could subscribe for stocks about to be created. *Ib.*

13. The trustees had invested a portion of the trust fund in the stock of the old *Bank of the United States*, and when its charter was about to expire, they, with all the other non-resident stockholders, executed a power of attorney, authorising *N B* to act for them in relation to an application for a charter to any State legislature, and the acceptance thereof. Application was accordingly made, and the charter granted by *Pennsylvania* was accepted by all the stockholders of the old bank, except the *United States*, and the shares of all the stockholders so applying were afterwards changed to an equal number in the new bank, by *N B*, all whose acts, so far as they were concerned, the trustees ratified and confirmed. HELD: That these proceedings did not constitute a breach of trust on the part of these trustees, and they were not responsible for the loss subsequently arising to the trust fund, from the failure of the new bank. *Ib.*

14. A trustee is not chargeable with more than he has received, unless there is evidence of very gross negligence, amounting to wilful default. *Ib.*

15. Where trust moneys are once properly invested in stock, the trustees cannot, without express authority, dispose of the stock, and invest it in other securities. *Ib.*

16. Where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for losses accruing in the management of the trust property. *Ib.*

See COURT OF CHANCERY, 1 to 10.

USURY.

1. Where a party seeks to relieve himself, on the ground of usury, from the payment of the sum claimed on the contract, he must tender the amount actually due; but where the contract or judgment is already satisfied, and the party seeks to have the excess accounted for and restored, the reason of the rule ceases. *Thomas vs. Doub*, 1.

2. A willingness to allow all that is actually and fairly due, is the equitable requirement, and as the complainant, in his bill, insists that *T's* judgment "ought to stand only as a security for the sum actually due from the defendant in it," this, under the circumstances of this case, if not an actual tender, is fully equivalent to what the rule requires; it is an offer to do equity before he asks relief. *Ib.*

3. The case of *Jordan vs. Trumbo*, 6 *G. & J.*, 103, asserts the rule in regard to pleading usury, in all its breadth, but evidently applicable

USURY.—*Continued.*

only where relief is sought against payment and compliance with an usurious contract. *Thomas vs. Doub*, 1.

VACATING DEEDS.

1. Relief will be granted against a deed where oppression or imposition has been practised in obtaining it; and gross inadequacy of price is one of the evidences of such imposition or oppression. *Hays vs. Hollis*, 357.
2. The rule of law which denies to a party claiming under the deed, the privilege of sustaining it by any other consideration than that mentioned in it, does not allow a grantor or donor to destroy his own deed, by showing a consideration different from the one expressed on its face. *Ib.*
3. Cases may occur where it may be indicative to a greater or less extent of fraud, imposition, or imbecility, but a smaller or different consideration can never, of itself, avail a grantor or donor, of competent intellect, to avoid his solemn deed, executed with full knowledge and free consent. *Ib.*

VARIANCE.

See DESCRIPTION OF LAND.

VARIATION OF THE COMPASS.

See EJECTMENT, 11.

VENIRE.

1. In removals from the King's bench, the *venire* in the indictment remains the same; the place of trial alone is changed. *Price vs. The State*, 295.
2. The words of the record, "whereupon, let a jury thereon appear before the court, immediately by whom, and so forth," state the *venire* for the petit jury, and the expression, "ten of which said jurors being called come, and so forth," refers to the impannelling, electing, and trying of the individual jurors, and not to the *venire*. *Ib.*

WILL AND TESTAMENT.

1. A testator gave legacies to several of his children, adding thereto the words, "*and no more of my estate.*" HELD: that these words cannot have the effect to exclude such children from participating in the undisposed of residue of the estate; neither can they give such residue *by implication* to the other children, to whose legacies no such restriction was annexed. *Stewart and Wife, vs. Pattison's Exc'rs*, 41.
2. A man must dispose of his property in his will, by saying expressly, or by necessary implication, to whom it shall go; not by declaring to whom it shall *not go*. The law will not sanction a disposition in this latter mode. *Ib.*

WILL AND TESTAMENT.—*Continued.*

3. The law does not conclude, that because a man has determined to disinherit one child, he means that all the rest of his children should be his residuary legatees. The act of disinheriting a child, is one which the law cannot regard very favorably. *Ib.*
4. The words "no more of my estate," may be rejected as surplussage. They evidence an intent; but a mere intention will not exclude the children to whose legacies they are annexed, from their shares of the residuum of the estate. *Ib.*
5. A testator gave, by his will, to two of his daughters, $1,500 each, to be paid them by their brother, to whom he devised, by the same will, certain real estate, which he afterwards conveyed to such brother by deed. HELD: that these daughters were not entitled to have this sum paid them out of the residue of the personal estate. If payable at all, it must be claimed of the devisee, who, by the will, is required to pay it. *Ib.*
6. If a will sufficient to pass personalty, gives a legacy to the heir, and devises the realty away from him, he may take the legacy, and claim the estate by descent; but if the legacy be on the express condition annexed, that he shall confirm the devise, he cannot take the legacy and disaffirm the devise. *Jones vs. Jones*, 197.
7. The wills of infants and feme coverts being void as to realty, raise no implication, and the heir may claim both the legacy and the land devised to another, by such a will. *Ib.*
8. A will of lands that is not executed and attested according to our statutes, can create no election as to the lands here, *from implication*, because such an instrument is no will here, and, therefore, inoperative. *Ib.*
9. In this case, a will was executed in *Pennsylvania*, before two witnesses only, and, therefore, void as to the lands in *Maryland*. It contained no express condition requiring an election as to the lands here. HELD: that it could not operate to divest a child of his inheritance here, or put him to his election. *Ib.*
10. A testator, by his will, devised "that all his negroes be free at the age of thirty-eight years, provided they leave the State within thirty days after they attain said age," "and should they return to reside in the State, my will is, then, that they shall be slaves to my heirs." HELD: That the conditions attached to this bequest of freedom, are conditions subsequent, and, being subsequent, are wholly unauthorised by the act of Assembly, and, therefore, void. *Spencer vs. Negro Dennis*, 314.

WITNESS.

See EVIDENCE.

WRIT OF ERROR.

See APPEAL, 1.

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